91-1045

No. _____

In The

Supreme Court of the United States

October Term, 1991

DERRELL E. UPTON,

Petitioner,

vs.

BERNIE C. THOMPSON, Individually and in his capacity as Sheriff of Kankakee County, Illinois,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment prohibit a sheriff from discharging a deputy sheriff on the basis of his political affiliation, an issue as to which there is a conflict among the Courts of Appeal?

2. Under *Elrod* and *Branti*, are findings concerning the nature of a discharged deputy sheriff's political speech or activity relevant to the question of whether political affiliation is an appropriate requirement for the effective performance of the position of deputy sheriff?

3. Did the Court of Appeals improperly make factual determinations concerning the nature of the duties and responsibilities of deputy sheriffs, the role of political affiliation in the effective performance of these duties and responsibilities and the potential disruptiveness of a particular deputy sheriff's political expressions without adequate support in the record?

4. Did the Court of Appeals err by finding that political affiliation is an appropriate requirement for the position of deputy sheriff in Kankakee County, Illinois without considering that a merit-based system for the employment of deputy sheriffs had been established in Kankakee County?

5. For purposes of a qualified immunity analysis, was the law clearly established in December, 1986 that the termination of a deputy sheriff in Kankakee County, Illinois for political reasons violated the First Amendment?

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals for the Seventh Circuit are:

Plaintiff-Appellees:

Derrell E. Upton[1]

Jack L. Thulen[2]

Defendant-Appellants:

Bernie C. Thompson, individually and in his capacity as Sheriff of Kankakee County, Illinois

Marvin Bausman, individually and in his official capacity as Sheriff of Carroll County, Illinois

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[1] Upton sued Thompson in an action in the United States District Court for the Central District of Illinois, Danville Division.

[2] Thulen sued Bausman in a separate action in the United States District Court for the Northern District of Illinois, Western Division. Although the cases were not formally consolidated before the Court of Appeals, there were argued before the same panel and disposed of by the Court of Appeals in a single, integrated opinion.

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OPINIONS IN THE CASE

The opinion of the United States Court of Appeals for the Seventh Circuit is entitled *Upton v. Thompson*, is reported at 930 F.2d 1209 (7th Cir. 1991) and appears as Appendix A hereto. The judgment of the Court of Appeals appears as Appendix B hereto. The decision of the Court of Appeals denying the petition for rehearing and rehearing en banc and the dissenting opinion is entitled *Thulen v. Bausman*, is reported at 938 F.2d 84 (7th Cir. 1991) and appears as Appendix C hereto. The decision and opinion of the United States District Court for the Central District of Illinois, Danville Division and the Recommendation of the United States Magistrate which

was adopted by the district court in its opinion appear respectively as Appendix D and Appendix E hereto.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on Aprii 22, 1991. The Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc on July 26, 1991 with three members of the Court of Appeals dissenting from the denial of rehearing en banc. On October 24, 1991, pursuant to Petitioner's application, Justice Stevens granted Petitioner an extension of time until December 23, 1991 in which to file a petition for writ of certiorari. The jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred upon this court by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Constitution of the United States Amendment XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this Section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Illinois Revised Statutes, 1989, ch. 34, ¶3-6019

Duties of sheriff; office quarters and hours. Sheriffs shall serve and execute, within their respective counties, and return all warrants, process, orders and judgments of every description that may be legally directed or delivered to them. A sheriff of a county with a population of less than 1,000,000 may employ civilian personnel to serve process in civil matters.

Illinois Revised Statutes, 1989,
ch. 34, ¶3-6022

Posse comitatus. To keep the peace, prevent crime, or to execute any warrant, process, order, or judgment he or she may call to his or her aid, when necessary, any person or power of the county.

Illinois Revised Statutes, 1989,
ch. 34, ¶3-6023

Attendance at courts. Each sheriff shall, in person or by deputy, attend upon all courts held in his or her county when in session, and obey the lawful orders and directions of the court. Court services customarily performed by sheriffs shall be provided by the sheriff or his deputies, rather than by employees of the court, unless there are no deputies available to perform such services. . . .

Illinois Revised Statutes, 1985,
ch. 125, ¶152

Applicability and adoption. The County board of every county having a county police department merit board . . . shall adopt and implement the merit system provided by this Act and shall modify the merit system now in effect in that county as may be necessary to comply with this Act.

The county board of any county having a population of less than 1,000,000 which does not have a merit board or merit commission for sheriff's personnel may adopt and implement by ordinance the merit system provided by this Act. If the county board does not adopt such a merit system by an ordinance and if a petition signed by not fewer than 5% or 1000, whichever is less, of the registered electors of any such county is filed with the county clerk requesting a referendum on the adoption of a merit system for deputies in the office of the Sheriff, the

county board shall, by appropriate ordinance, cause the question to be submitted to the electors of the county, at a special or general election. . . . If a majority of those voting on the proposition at such election vote in favor thereof, the county board shall adopt and implement a merit system provided in this Act. When a merit board or merit commission for sheriff's personnel has been established in a county, it may be abolished by the same procedure in which it was established.

Illinois Revised Statutes, 1985,
ch. 125, ¶157

Duties and jurisdiction. The Merit Commission shall have the duties, pursuant to recognized merit principles of public employment, of certification for employment and promotion, and, upon complaint of the sheriff or states attorney as limited in this Act, to discipline or discharge as the circumstances may warrant. All full time deputy sheriffs shall be under the jurisdiction of this Act and the county board may provide that other positions, including jail officers, . . . shall be under the jurisdiction of the Commission. There may be exempted from coverage by resolution of the county board a "chief deputy" or "chief deputies" who shall be vested with all authorities granted to deputy sheriffs. . . . "Chief Deputy" or "Chief Deputies" as used in this Section include the personal assistant or assistants of the sheriff whether titled "chief deputy", "under sheriff", or "administrative assistant."

Illinois Revised Statutes, 1985,
ch. 125, ¶160

Certified personnel–appointment. The appointment of all personnel subject to the jurisdiction of the Merit Commission shall be made by the sheriff from those applicants who have been certified by the Commission as being qualified for appointment. A Commission may, by

its rules and regulations, set forth the minimum requirements for appointment to any position. In addition, the Commission's review of any application may include examinations, investigations or any other method consistent with recognized merit principles, which in the judgment of the Commission is reasonable and practical for any particular classification. . . .

The sheriff shall make appointments from those persons certified by the Commission as qualified for appointment. If the sheriff rejects any person so certified, the sheriff shall notify the Commission in writing of such rejection.

The rules and regulations of the Commission shall provide that all initial appointees shall serve a probationary period of 12 months during which time they may be discharged at the will of the sheriff.

Illinois Revised Statutes, 1985,
ch. 125, ¶161

Certified personnel – promotion. Whenever a position in a higher rank is to be filled, the Merit Commission shall certify to the sheriff the names of eligible persons who stand highest upon the promotional register for the rank to which the position belongs. The Commission shall make certifications for promotion on the basis of ascertained merit, seniority of service, and physical and other qualifying examinations. . . .

Illinois Revised Statutes, 1985,
ch. 125, ¶162

Political affiliation. All appointments and promotions shall be made in accordance with the provisions of this Act and the rules and regulations of the Commission, without consideration of the political affiliation of any applicant.

Illinois Revised Statutes, 1985, ch. 125, ¶163

Disciplinary measures. Disciplinary measures for actions violating either the rules and regulations of the Commission or the internal procedures of the sheriff's office may be taken by the sheriff. Such disciplinary measures may include the suspension of any certified personnel for reasonable periods, not exceeding a cumulative 30 days in any 12-month period.

Illinois Revised Statutes, 1985, ch. 125, ¶164

Removal, demotion or suspension. Except as is otherwise provided in this Act, no certified personnel shall be removed, demoted or suspended except for cause, upon written charges filed with the Merit Commission by the sheriff. Upon the filing of such a petition, the sheriff may suspend the certified person pending the decision of the Commission on the charges. After the charges have been heard, the Commission may direct that the person receive his pay for any part or all of this suspension period, if any.

The charges shall be heard by the Commission upon not less than 14 days' certified notice. At such hearing, the accused certified person shall be afforded full opportunity to be represented by counsel, to be heard in his own defense and to produce proof in his defense. Both the Commission and the sheriff may be represented by counsel. The State's Attorney of the applicable county may advise either the Commission or the sheriff. The other party may engage private counsel to advise it. . . .

If charges against an accused person are established by preponderance of the evidence, the Commission shall make a finding of guilty and order either removal, demotion, loss of seniority, suspension for a period of not more than 180 days, or such other disciplinary punishment as

may be prescribed by the rules and regulations of the Commission which, in the opinion of the members thereof, the offense justifies. If the charges against an accused person are not established by the preponderance of the evidence, the Commission shall make a finding of not guilty and shall order that the person be reinstated and be paid his compensation for the suspension period, if any, while awaiting the hearing. The sheriff shall take such action as may be ordered by the Commission.

The provisions of the Administrative Review Law, . . . shall apply to and govern all proceedings for the judicial review of any order of the Commission rendered pursuant to this Section. . . .

STATEMENT OF THE CASE

Petitioner, Derrell E. Upton filed this suit in the United States District Court for the Central District of Illinois under 42 U.S.C. §1983 against Respondent, Bernie C. Thompson, individually and in his official capacity as Sheriff of Kankakee County, Illinois. Petitioner alleges that he was terminated from his position as a deputy sheriff in Kankakee County by Respondent, a Democrat, because of his political affiliation with the Republican Party and his support in the November, 1986 election for sheriff for Respondent's opponent, William F. Scroggins, the Republican incumbent.

Petitioner had been hired as a deputy sheriff in August, 1986 by Sheriff Scroggins. Prior to being hired, Petitioner was certified as qualified by the Kankakee County Sheriff's Merit Commission in accordance with the merit selection procedures adopted by Kankakee County pursuant to the Sheriff's Merit System Act (Ill. Rev. Stat., 1985, ch. 125, ¶¶151 *et seq.* now at Ill. Rev. Stat., 1989, ch. 34, ¶¶3-8002 *et seq.*). The Act provided that after serving an initial probationary period (Ill. Rev. Stat. 1985,

ch. 125, ¶160), a deputy sheriff could not be removed, demoted or suspended, except for cause (Ill. Rev. Stat., 1985, ch. 125, ¶164). The Act further mandated that all appointments and promotions of deputy sheriffs were to be made without reference to political affiliation (Ill. Rev. Stat., 1985, ch. 125, ¶162).

Petitioner displayed a Scroggins bumper sticker on his personal automobile during the 1986 election campaign for sheriff, but did not actively campaign for Sheriff Scroggins or otherwise publicly express his personal support for the incumbent. During the election campaign, Petitioner was acting president of the local chapter of a law enforcement officers' union. Although Petitioner urged the union members not to publicly endorse a candidate in the sheriff's race, the union voted to endorse Sheriff Scroggins for re-election. In his capacity as acting president of the union, Petitioner was questioned by reporters concerning the union's endorsement.

Respondent defeated Sheriff Scroggins in the November, 1986 election and was sworn in as Sheriff of Kankakee County on December 1, 1986. Respondent terminated Petitioner and Jeffery Cavender, another deputy sheriff who had been hired under Sheriff Scroggins, on December 6, 1986; both were discharged prior to the expiration of their probationary periods.

Respondent filed a motion for summary judgment in the district court in which he argued that he was immune from liability in his individual capacity under the doctrine of qualified immunity because the law was not clearly established in December, 1986 that a deputy sheriff could not be terminated based upon his political affiliation. Respondent also contended that, as a matter of law, Petitioner's discharge from his position as a deputy sheriff did not violate Petitioner's rights under the First Amendment because political affiliation is an appropriate requirement for the position of deputy sheriff. On this basis, Respondent contended that deputy sheriffs did not

fall within the rule prohibiting terminations of public employees for political reasons established by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). Although Respondent previously denied Petitioner's allegation that his termination was politically motivated, for purposes of the summary judgment motion, Respondent invited the district court to assume that this allegation was true.

In moving for summary judgment, Respondent urged the district court to follow a recent decision of the Court of Appeals for the Eleventh Circuit in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) which held that, as a matter of law, political affiliation was an appropriate requirement for deputy sheriffs. Prior to *Terry*, the Court of Appeals for the Fourth Circuit in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) and the Court of Appeals for the Fifth Circuit in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981) had held that political loyalty was not essential to the performance of a deputy sheriff's duties.

United States Magistrate, Robert J. Kauffman issued a recommendation that Respondent's summary judgment motion be denied on both of the bases asserted by Respondent. Magistrate Kauffman noted in his Recommendation that if Respondent wished to argue that Petitioner occupied a position for which political affiliation is an appropriate requirement under *Elrod* and *Branti*, he would have to do so on the facts and that such facts were not before court. Chief United States District Judge Harold A. Baker subsequently adopted the Magistrate's recommendation and denied Respondent's motion for summary judgment in its entirety on February 21, 1990. The district court declined to follow the decision of the Court of Appeals for the Eleventh Circuit in *Terry* and described that decision as "aberrant and in conflict with" the holdings of *Elrod* and *Branti*.

Respondent appealed the district court's ruling, with respect to the issue of qualified immunity only, to the

United States Court of Appeals for the Seventh Circuit. The Court of Appeals had jurisdiction to review the denial of qualified immunity as a final, appealable decision within the meaning of 28 U.S.C. §1291 pursuant to this Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). On April 22, 1991, the Court of Appeals issued a judgment and opinion in which it reversed the district court's denial of qualified immunity. The Court of Appeals further held that, as a matter of law, it was permissible under the First Amendment for a sheriff to use political considerations in determining who will serve as a deputy sheriff. The Court of Appeals disposed of Petitioner's case in a single opinion with *Thulen v. Bausman*, another matter pending before the Seventh Circuit. *Thulen* involved a deputy sheriff in Carroll County, Illinois who alleged that he had been discharged for political reasons.

Following the decision of the Court of Appeals, Petitioner and Thulen both filed petitions for rehearing with suggestions for rehearing en banc. On July 26, 1991, all of the members of the panel voted to deny the petitions for rehearing and a majority of the active judges on the Court of Appeals voted to deny rehearing en banc with respect to both cases. However, four of the active judges, Circuit Judges Ripple, Wood, Jr., Cudahy and Posner, voted to grant rehearing en banc. In a opinion which was joined by the other three dissenting judges, Judge Ripple expressed his disagreement with the panel's decision to the extent that it exceeded the scope of the qualified immunity issue presented by the interlocutory appeal. Judge Ripple observed that the panel's decision "raises serious questions of methodology and substance" and concluded that the entire Court of Appeals should determine:

> . . . 1) [W]hen it is appropriate to go beyond the qualified immunity issue on interlocutory appeal; 2) whether we shall abandon our precedent requiring findings tailored to the particular position at stake; and 3) whether the broad holding of the panel ought to govern cases other than this one. *Thulen v. Bausman*, 938 F.2d 84, 86 (1991).

REASONS FOR GRANTING THE WRIT

I.

THE HOLDINGS OF THE SEVENTH AND ELEVENTH CIRCUITS THAT DEPUTY SHERIFFS MAY BE DISMISSED BECAUSE OF THEIR POLITICAL BELIEFS ARE IN DIRECT AND TOTAL CONFLICT WITH THE HOLDINGS OF THE FOURTH AND FIFTH CIRCUITS ON THIS ISSUE.

The decision of the Court of Appeals for the Seventh Circuit in this case reflects an intolerable lack of consensus among the Circuit Courts of Appeal with regard to the question of whether deputy sheriffs may be terminated on the basis of their political beliefs. The Seventh Circuit ruled that, as a matter of law, political affinity is an appropriate requirement for the position of deputy sheriff and that consequently under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), a sheriff's politically motivated termination of a deputy sheriff does not violate the First Amendment. *Upton v. Thompson*, 930 F.2d 1209, 1218.

In *Elrod*, this Court held that the patronage dismissals of nonpolicymaking, nonconfidential employees of the office of the Sheriff of Cook County, Illinois violated the First and Fourteenth Amendments. Several years later in *Branti*, this Court reaffirmed that only an extremely narrow category of employees–those for whom the hiring

authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved–are lawfully subject to termination on purely political grounds. 445 U.S. at 518. In applying the *Elrod/Branti* rule, the Seventh Circuit has acknowledged that, even after *Branti*, the descriptions "policymaking" and "confidential" accurately describe the vast majority of offices which fall within the realm of legitimate patronage. *See Matlock v. Barnes*, 932 F.2d 658, 662 (7th Cir. 1991).

In political patronage cases, the defendant bears the burden of establishing that political affiliation is an appropriate qualification for the position from which the plaintiff is ousted. *Elrod*, 427 U. S. at 368. In this case, the district court concluded that Respondent had failed to introduce any facts which demonstrated that political affiliation was an appropriate job requirement for a deputy sheriff. In the context of an interlocutory qualified immunity appeal, the Court of Appeals has reversed this determination.

In support of its conclusion, the Court of Appeals stated that, particularly in a small department, the sheriff's core group of advisors is likely to be his deputies and that a deputy sheriff, in implementing the sheriff's policies, is likely to make certain decisions which actually create policy. *Upton*, 930 F.2d at 1215. The Court of Appeals made these findings based upon a record which contained no affidavits, deposition testimony or other evidentiary material descriptive of the nature of the duties performed by deputy sheriffs in Kankakee County, Illinois or in any other sheriff's department within the Seventh Circuit. While the Court of Appeals observed that it viewed the specific position of power involved, the customary intimacy of association within the office and the need for mutual trust and confidence to be relevant to its determination, it did not identify any facts pertaining

to any of these considerations upon which it had relied in this case. *Upton*, 930 F.2d at 1217.

The decision of the Seventh Circuit on this issue is irreconcilable with that of the Fourth Circuit in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) and the Fifth Circuit in *Barrett v. Thomas*, 649 F.2d 1193 (1981). In *Jones* and *Barrett*, both of which were decided based upon a record fully developed at trial, the Courts of Appeal held that political loyalty was not required for the effective performance of the duties of deputy sheriffs.

In *Jones*, a deputy sheriff and a former dispatcher for the sheriff's department alleged that their First Amendment rights had been violated because they had been discharged based upon their political affiliations and expressions. The Fourth Circuit concluded that regardless of the size of the office, or the specific position of power involved, or the customary intimacy of associations within the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, none of the duties of deputy sheriffs could be found to involve policymaking related to "partisan political interests" and to involve access to confidential information "bearing . . . on partisan political concerns" 727 F.2d at 1338.

In *Barrett*, the Court of Appeals for the Fifth Circuit concluded that the sheriff had failed to provide a satisfying justification for demanding political loyalty from the deputy sheriffs employed by his office. Barrett was a deputy sheriff who had served under and supported Sheriff Thomas' Republican predecessor. Thomas demoted Barrett after he took office and eventually terminated Barrett after he publicly criticized the sheriff's political purges. 649 F.2d at 1195.

The Court of Appeals in *Barrett* noted that the sheriff had not identified any vital governmental interest that would be furthered by compelling his deputies to "toe the political line" or that "such line-toeing" was the least restrictive means of achieving a legitimate governmental

objective. 649 F.2d at 1200. The Court of Appeals also rejected the argument advanced by the sheriff that lack of political cohesion reasonably could threaten to undermine an intimate working relationship between the sheriff and deputy sheriffs in a department which employed approximately 500 deputies. 649 F.2d at 1201.

In *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984), which involved a five-man sheriff's department, the Fifth Circuit concluded that the small size of a sheriff's office did not require departure from its previous holding in *Barrett* that political loyalty was not required for the effective performance of the duties of deputy sheriffs. This stands in sharp contrast to the Seventh Circuit's apparent belief that between 70 and 80 deputy sheriffs in Kankakee County, Illinois were likely to form the sheriff's core group of advisors.

In *Matherne v. Wilson*, 851 F.2d 725 (5th Cir. 1988), the Fifth Circuit held that a deputy sheriff could not be discharged because of his participation in the political campaign of the sheriff's opponent. The Court of Appeals noted that the sheriff had admitted at trial that Matherne, a deputy sheriff in his department, was subject to a strict chain of command overseeing his job performance. The Fifth Circuit also found that a deputy sheriff performed the duties of a professional peace officer, not the politically sensitive responsibilities of a confidential aide to a politically elected official. Finally, the Court of Appeals in *Matherne* noted that there was absolutely no evidence that Matherne's decision to oppose the sheriff in the election had created any debilitating strife within the sheriff's department or that Matherne had or would fail to properly carry out his duties in order to discredit the sheriff. 851 F.2d at 761.

Aligned with the Seventh Circuit on this issue is the Court of Appeals for The Eleventh Circuit. In *Terry v. Cook*, 866 F. 2d 373 (11th Cir. 1989), the Eleventh Circuit held that under *Elrod* and *Branti* political loyalty to the

sheriff was an appropriate requirement for deputy sheriffs under the Alabama statutory scheme. The conclusion of the Eleventh Circuit, like that of the Seventh Circuit, was reached prior to trial without reference to evidentiary matter concerning the nature of the position in question. The decision of the Court of Appeals in *Terry* rests primarily upon the court's perception that *Elrod* and *Branti* do not afford First Amendment protection to the political beliefs of public employees who may be responsible for implementing the policies of an elected public official. 866 F.2d at 377. Implicit in this view is the assumption that only the sheriff's political allies can be counted upon to efficiently and effectively carry out the sheriff's policies, a notion that was explicitly rejected in *Elrod*. 427 U.S. at 364-65.

Not only have the Circuit Courts of Appeal rendered conflicting decisions with respect to the politically motivated dismissals of deputy sheriffs, they have also employed inconsistent analyses in doing so. There is disagreement among the Courts of Appeal concerning the appropriate inter-relationship between *Elrod* and *Branti* and the line of cases following from the decisions of this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983).

Pickering and *Connick* hold that a public employee may not be discharged lawfully for the expression of ideas on any matter of legitimate public concern unless the public employer's "interest in the effective and efficient fulfillment of its responsibilities to the public" outweighs the employee's interest in the free expression of the ideas. *Connick*, 461 U.S. at 150. While the Courts of Appeal agree that the *Elrod/Branti* rule is applicable to cases in which a public employee is terminated because of his privately-held political beliefs, the Fourth and Fifth Circuits have held that the *Pickering/Connick* balancing test should be used to determine the constitutionality of

patronage dismissals arising from overt expressive conduct.

The Seventh Circuit appears to have ruled in this case that a deputy sheriff may be discharged from his or her position even on the basis of privately-held political beliefs without violating the deputy's First Amendment rights. The Court of Appeals professed to have applied *Elrod* and *Branti* in reaching this conclusion. However, the Court of Appeals also intimated in its opinion that a factor in its decision was its perception that Petitioner's prior support for Respondent's opponent in the election could have developed into a source of disruption within the sheriff's department. 930 F.2d at 1216. In addition to being unsubstantiated, this finding is irrelevant to an analysis under *Elrod* and *Branti* which properly focuses upon the attributes of the position at issue rather than on the conduct of an individual employee holding that position.

The Fourth Circuit in *Jones* and the Fifth Circuit in *McBee* and *Matherne*, however, held that the *Pickering/Connick* balancing test is the appropriate standard to be used in determining whether deputy sheriffs may be discharged for their "overt speech activity", as opposed to "raw patronage reasons". 727 F.2d at 1336. In *Jones*, the Fourth Circuit determined as a matter of law that a deputy sheriff could not be discharged simply because of his political beliefs, but remanded the case to the district court for a factual determination of whether the plaintiffs had been discharged because of party affiliation or because of specific speech activity. The Court of Appeals instructed the district court that if the discharge was motivated by the latter, the *Connick/Pickering* balancing test was applicable, regardless of the content of the employee's expression. 727 F.2d at 1336.

In *McBee*, the Fifth Circuit, in an effort to clarify its interpretation of the correct inter-relationship between the *Elrod/Branti* rule and the *Connick/Pickering* balancing test, suggested that politically motivated terminations may be

viewed on a spectrum. At one end of this spectrum are cases such as *Elrod* and *Branti* which involved loyal and effective employees who were discharged solely because of their private political beliefs. At the other end are cases involving employee speech or activity which is openly hostile, abusive or insubordinate. The Court of Appeals concluded that the appropriate standard to be used in "mid-spectrum" cases was the *Connick/Pickering* balancing test. 730 F.2d at 1014-15. In *McBee*, the Court of Appeals remanded the case to the district court to conduct a "particularized inquiry" with this distinction in mind. 730 F.2d at 1017.

In *Matherne*, the Fifth Circuit applied the *Pickering/Connick* balancing test to the record before it and concluded that the political activities of the deputy sheriff in that case were protected by the First Amendment. The Court of Appeals found that a deputy sheriff's choice of candidate in an election is a matter of legitimate public concern and, therefore, protected under the First Amendment. Based upon its finding that political loyalty was not essential to the duties of a deputy sheriff, the fact that the deputy sheriff's activities were conducted outside of the sheriff's office, and the lack of evidence that the deputy's political opposition to the sheriff impaired any close working relationship, the Court of Appeals concluded that the sheriff could demonstrate no countervailing interest which outweighed the deputy's speech and associational rights. 851 F.2d at 760-61.

The Fourth and Fifth Circuits thus recognize that deputy sheriffs may align with the political party and candidate of their choice and even actively support the sheriff's political opponent without being vulnerable to patronage dismissals so long as their political activities do not actually interfere with their duties and responsibilities. The Seventh and Eleventh Circuits deny deputy sheriffs these fundamental rights under all circumstances. In the Seventh and Eleventh Circuits, a factual inquiry

apparently is not required in determining which categories of employees are subject to patronage dismissals.

The opinion of the Seventh Circuit in this case, in addition to being erroneous in its conclusion, reflects the lack of consistency between the various approaches utilized by the Circuit Courts of Appeals in applying the *Elrod/Branti* rule and the urgent need for guidance from this Court with regard to the proper methodology to be used in cases involving politically motivated discharges. The uncertainty and injustice created by the conflicting decisions of the Circuit Courts of Appeal on this issue affects not only deputy sheriffs, but thousands, perhaps millions, of middle-level public employees whose First Amendment rights are now unclear. Until this Court addresses and resolves this conflict, public employees, and particularly deputy sheriffs, will be unable to freely exercise their First Amendment right to support the political party and candidates of their choice without risking the loss of their livelihood.

II.

THE COURT OF APPEALS INCORRECTLY INTERPRETED AND APPLIED THE APPLICABLE LAW IN RULING THAT DEPUTY SHERIFFS MAY BE TERMINATED BECAUSE OF THEIR POLITICAL BELIEFS.

The decision of the Court of Appeals in this case is contrary to the holdings of this Court in *Elrod v. Burns, supra, Branti v. Finkel, supra* and *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990). In *Elrod*, the plurality held that conditioning the retention of public employment upon an employee's support of the party or individual in office cannot withstand constitutional challenge unless it furthers a vital government end by a means that is the least restrictive of freedom of belief and association in achieving that end. *Elrod* further established that the government bears the burden of showing that the benefit that

it gains outweighs the employee's loss of his constitutionally protected rights. 427 U.S. at 347.

The plurality in *Elrod* acknowledged that there is a vital need for governmental efficiency and effectiveness, but concluded that patronage dismissals in most instances were not the least restrictive means for achieving that end. 427 U.S. at 372. In *Branti* and *Rutan*, this Court reiterated and reaffirmed these holdings. *Branti*, 445 U.S. at 517; *Rutan*, 110 S.Ct. at 2737-39. *Rutan* also significantly expanded the reach of the *Elrod/Branti* rule by holding that the First Amendment's proscription of patronage dismissals extends to promotion, transfer, recall or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement. 110 S. Ct. 2733-34.

The reasoning of the Seventh Circuit in this case is completely inconsistent with the foregoing principles. In support of its conclusion that political affiliation is an appropriate requirement for deputy sheriffs, the Court of Appeals observed that the sheriff is chosen by the electorate to serve the public at large based upon popular ratification of a political agenda and that the sheriff has the authority to establish the policies necessary to carry out that agenda. *Upton*, 930 F.2d at 1215. While these observations may be accurate, they are equally applicable to virtually every other elected public office and provide little insight into either the relationship between a sheriff and the deputy sheriffs employed by his office or the particular functions performed by deputy sheriffs.

Another justification offered by the Court of Appeals for concluding that political loyalty is required for the performance of deputy sheriffs' duties is that the sheriff depends upon his deputies to project his competence and the competence of his office and to provide him with truthful, accurate and beneficial information which he needs to make decisions and administer his office. 930 F.2d at 1215. This reasoning is entirely contrary to the

holdings of *Elrod* and *Branti* because it equates a deputy sheriff's competence, efficiency and even integrity with political loyalty or party affiliation. *Elrod* flatly rejected the argument that a predisposition toward poor job performance or ill-willed conduct could be attributed to a public employee simply because his political beliefs differ from those of his employer. 427 U.S. at 347. Furthermore, the sheriff's merit commission system which existed in Kankakee County, Illinois at the time Petitioner was discharged provided procedures for removing or otherwise disciplining deputy sheriffs who did not adequately fulfill their duties which were far less restrictive of deputy sheriffs' First Amendment rights than patronage dismissals (Ill. Rev. Stat., 1985, ch. 125, ¶164).

As the plurality in *Elrod* noted, the wholesale replacement of large numbers of public employees each time a public office changes hands only undermines government efficiency and effectiveness. 427 U.S. at 364-65. In this case, however, the Court of Appeals gives no consideration to the loss of efficiency and vital police protection which inevitably would result from deputy sheriffs being discharged *en masse* each time a new sheriff is elected, not to mention the enormous expenditures which would be required to provide essential law enforcement training to the new sheriff's appointees.

The Court of Appeals also relies upon its perception that deputy sheriffs are vested with substantial discretionary authority in the implementation of the policy goals of the sheriff. *Upton*, 930 F.2d at 1215. In support of this position, the Court of Appeals cites its earlier decisions in *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) and *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985). In both cases, the Seventh Circuit reviewed district court findings that had been entered after trials. *Livas* held that assistant public prosecutors may be dismissed because of their political affiliation. In *Tomczak*, the Court of Appeals

determined that the position of First Deputy Commissioner of the City of Chicago Water Department, the second highest ranking position in that department, was exempt from the prohibition against patronage dismissals.

The Court of Appeals equates the discretionary authority of deputy sheriffs with the discretionary authority inherent in the positions examined in *Livas* and *Tomczak* although there is absolutely no evidence in the record concerning the nature of the discretionary authority vested in deputy sheriffs in Kankakee County. However, even in the absence of such evidence, common experience tells us that the discretionary authority wielded by an assistant public prosecutor or the second-ranking administrator in a large municipal department is certain to involve far more significant and politically sensitive decisions than those ordinarily made by a police officer.

The discretionary functions which a prosecuting attorney may routinely and independently perform include determining for which charges an offender will be prosecuted, or if the offender will be prosecuted at all, developing the strategy to be employed in preparing and presenting a case for trial and negotiating plea-bargains. In its opinion in *Tomczak*, the Court of Appeals specifically relied upon the substantial evidence in the record which supported the finding that the First Deputy Commissioner of the City of Chicago Water Department was a high-level administrator who was charged with broad responsibilities for both policymaking and policy implementation. 765 F.2d at 638. The Court of Appeals identifies no specific facts in this case to support its conclusion that the limited discretionary authority of a deputy sheriff affects the overall implementation of his superior's policies to the same degree as an assistant public prosecutor or a deputy city commissioner.

The Court of Appeals also concludes without factual support in the record that, particularly in a small department, deputy sheriffs are among the sheriff's "core group of advisors". *Upton*, 930 F2d at 1215. Whether such a finding properly can be made as a matter of law with respect to even an extremely small sheriff's department is questionable. However, to simply assume this to be true in the context of the Kankakee County sheriff's department which, at the time Petitioner was terminated, employed between 70 and 80 deputies is clearly inappropriate. Respondent in this case has offered no evidence whatsoever concerning the "customary intimacy of association" or the "need for mutual trust and confidence" within the Kankakee County sheriff's office although the Court of Appeals identifies these as relevant concerns. *Upton*, 930 F.2d at 1217.

In his opinion dissenting from the Court of Appeals' decision to deny rehearing en banc, an opinion which was joined by three other active circuit judges, Judge Ripple expressed serious reservations concerning the Court of Appeals' use of an interlocutory qualified immunity appeal "to hand down a sweeping advisory opinion on the power of sheriffs to fire their deputies." *Thulen*, 938 F.2d at 85. Of particular concern to the dissenting judges was the Court of Appeals' departure in this case, without any explanation, from the Seventh Circuit's prior holdings that the question of whether a public employee occupies a position for which political affiliation is an appropriate requirement is a question of fact for the jury to decide. 938 F.2d at 85-86. *See e.g. Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991); *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981).

Perhaps most troubling of all, however, is the Court of Appeals' failure to address or even acknowledge the fact that at the time Petitioner was discharged there was in place in Kankakee County, Illinois a system for the

merit-based employment of deputy sheriffs. The Kankakee County Sheriff's Merit Commission was established pursuant to the Sheriff's Merit System Act (Ill. Rev. Stat., 1985, ch. 125, ¶¶151 *et seq.*, now at Ill. Rev. Stat., 1989, ch. 34, ¶¶3-8002, *et seq.*). The Sheriff's Merit System Act provides for the establishment of merit-based procedures for the selection, certification, hiring, demotion, removal and suspension of deputy sheriffs (Ill. Rev. Stat., 1985, ch. 125, ¶¶160 through 164). The Act specifically requires that appointments and promotions of deputy sheriffs be made without reference to political affiliation (Ill. Rev. Stat. 1985, ch. 125, ¶162). The Act also provides that deputy sheriffs, after serving an initial probationary period, shall not be removed, demoted or suspended except for cause and after written charges are filed with the Merit Commission by the sheriff. If charges are filed, the deputy is entitled to a hearing before a decision is made by the Merit Commission on the charges (Ill. Rev. Stat., 1985, ch. 125, ¶164).

By enacting the Sheriff's Merit System Act, the Illinois General Assembly unequivocally expressed its intention to eliminate political patronage from employment decisions concerning deputy sheriffs. By establishing a merit commission under the Act, Kankakee County ratified the lawmakers' decision. The Court of Appeals acknowledges that if a deputy sheriff were fired in violation of an effective civil service ordinance, he or she might be entitled to greater protection from patronage firing, but nonetheless ignores the existence of such a system in Kankakee County. *Upton*, 930 F.2d at 1216-17, n.4.

At the time he was terminated, Petitioner had not completed the initial probationary period which all deputies are required to serve under the Sheriff's Merit System Act (Ill. Rev. Stat., 1985, ch. 125, ¶160). However, Petitioner's probationary status cannot be used as a basis for denying him his rights under the First Amendment. This

Court repeatedly has held that even an "at will" employee who has no "right" to government employment cannot lawfully be denied employment based upon his exercise of a constitutionally protected right. *See Rutan v. Republican Party of Illinois,* 110 S.Ct. at 2735-36; *Perry v. Sindermann,* 408 U.S. 593, 596-98 (1971).

Furthermore, since the Sheriff's Merit System Act provides that deputy sheriffs cannot be appointed on the basis of political affiliation, it would serve no legitimate purpose to permit probationary deputies to be discharged on the basis of their political affiliation. The existence of this merit-based system in Kankakee County at the time Petitioner was terminated makes it virtually impossible for Respondent to credibly argue that he depended upon political cohesion with his deputies to effectuate his policies. The Court of Appeals erred by giving more weight to its own speculations concerning the importance of political loyalty to the performance of a deputy sheriff's duties than to the judgment of the Illinois General Assembly in this regard.

Finally, the Court of Appeals theorizes that Respondent might have perceived Petitioner's political beliefs as a potentially disruptive force within the sheriff's department. The Court of Appeals speculates that Petitioner was in a position to organize political opposition to Respondent and that Petitioner's leadership in a policemen's union which endorsed Respondent's opponent made it questionable whether he could faithfully execute Respondent's policies. *Upton,* 930 F.2d at 1216. Such suppositions are irrelevant to determining whether political loyalty is an appropriate requirement for a deputy sheriff under *Elrod* and *Branti*. However, even if such considerations were pertinent to this inquiry, there is no evidence whatsoever in the record that Petitioner's personal support for Sheriff Scroggins or his leadership in the union caused disruption in the sheriff's department or prevented Upton from adequately carrying out his duties as

a deputy sheriff. Even if the Court of Appeals had applied the *Connick/Pickering* balancing test, there would have been no basis for the Court of Appeals to rule, as a matter of law, that Petitioner's political support for Sheriff Scroggins was not protected by the First Amendment or that Respondent had any interest which outweighs the importance of these First Amendment rights.

III.

THE COURT OF APPEALS ERRED BY REVERSING THE DISTRICT COURT'S FINDING THAT RESPONDENT WAS ENTITLED TO QUALIFIED IMMUNITY

The Court of Appeals erroneously concluded that in December, 1986 when Petitioner was terminated, the law applicable to politically motivated terminations of deputy sheriffs was not clearly established and, therefore, that Respondent is protected by the doctrine of qualified immunity. *Upton*, 930 F.2d at 1218. The Court of Appeals based this holding upon its finding that, prior to Petitioner's dismissal, the courts had failed to develop and apply a consistent set of principles concerning patronage dismissals. In this context, the Court of Appeals reasoned, sheriffs, absent a direct holding on this issue, could not have a clear understanding as to whether deputy sheriffs were constitutionally protected from a politically based discharge. *Upton*, 930 F.2d at 1213. The Court of Appeals' decision on this issue is incorrect both in its characterization of the state of the law applicable to patronage dismissals in December, 1986 and in its application of the rule of qualified immunity.

This Court has held that qualified immunity is an affirmative defense which must be pleaded and proven by a defendant public official. *Gomez v. Toledo*, 446 U.S. 635 (1980). The general rule of qualified immunity is intended to protect government officials from liability for damages to the extent that their actions are reasonable in

light of current law. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). However, in defining the limits of the qualified immunity defense, this Court has emphasized that the doctrine is not intended to provide a license to lawless conduct; where an official reasonably could be expected to know that certain conduct violates a statutory or constitutional right, the official should be made to hesitate. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). The standard established by this Court for determining whether qualified immunity should apply is whether the contours of the right alleged to have been violated are sufficiently clear that a reasonable public official would understand that what he is doing violates that right. *Anderson*, 483 U.S. at 640.

In *Anderson*, this Court stated that the correct basis for evaluating a qualified immunity defense is not whether the particular conduct at issue has been specifically addressed by a court and held to be unlawful, but rather, whether in view of pre-existing law, the unlawfulness of the action was, or should have been, apparent. 483 U.S. at 640. Notwithstanding this principle, the Court of Appeals decided that Respondent should be afforded qualified immunity in this case largely because in December, 1986 the Seventh Circuit had not directly ruled upon the question of whether the termination of deputy sheriffs for political reasons violated the First Amendment. *Upton*, 930 F.2d at 1213. This conclusion reflects the Court of Appeals' erroneous assumption that the law pertaining to patronage dismissals was and is generally too confusing for a reasonable public official to fathom.

Contrary to the opinion of the Court of Appeals, there was ample existing judicial precedent in December, 1986 for a reasonably competent Sheriff of Kankakee County, Illinois to have been put on notice that the politically motivated discharge of a deputy sheriff violated the First Amendment. Not the least of these precedents is this Court's decision in *Elrod v. Burns, supra*. The Court of

Appeals found that *Elrod* was not controlling on the basis that none of the dismissed employees in that case were deputy sheriffs. *Upton*, 930 F.2d at 1213. However, this Court's opinion in *Elrod* reflects that the employees whom this Court determined to be protected against patronage dismissals in that case included the Chief Deputy of the Process Division, a bailiff and a process server. 472 U.S. at 372. Among the duties expressly conferred upon deputy sheriffs by Illinois law are those of a bailiff (*See* Ill. Rev. Stat., 1989, ch. 34, ¶¶3-6019 and 3-6023) and process server (*See* Ill. Rev. Stat., 1989, ch. 34 ¶3-6022). The functional similarity and overlap between the duties and responsibilities of the positions held by the employees in *Elrod* and those of deputy sheriffs alone would have made it evident to a reasonable sheriff in December, 1986 that he could not terminate his deputies on the basis of their politics.

The Court of Appeals' qualified immunity analysis in this case is also fatally flawed in that it attaches little or no significance to the decision of the Fourth Circuit in *Jones v. Dodson, supra* or to the holding of the Fifth Circuit in *Barrett v. Thomas, supra*. As previously discussed, the Courts of Appeals in those cases, both of which were decided prior to December, 1986, concluded that political loyalty was not an appropriate requirement for the effective performance of the duties of a deputy sheriff. The Court of Appeals also discounts the importance of *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986), a case which was decided by the Seventh Circuit approximately six months before Petitioner was terminated. *Perry* involved a deputy sheriff who alleged that he had been discharged because he ran against the sheriff in the race for Sheriff of Marinette County, Wisconsin. If a deputy sheriff's political activities constituted a legitimate basis for dismissal, *Perry* provided the optimum factual setting for such a ruling. However, the Seventh Circuit, on appeal, upheld the sufficiency of the jury's verdict against the sheriff.

The Court of Appeals also erred by failing to consider the effect of the Illinois statutory framework upon the sheriff's asserted defense of qualified immunity. The existence of a merit commission system in Kankakee County at the time Petitioner was discharged belies Respondent's contention that a reasonably competent sheriff could have believed that political loyalty was an appropriate requirement for deputy sheriffs.

Rather than acknowledging this controlling or closely analogous judicial and statutory authority, the Court of Appeals rests it qualified immunity ruling upon the Seventh Circuit's decisions in *Livas v. Petka, supra* (assistant public prosecutor may be dismissed due to political considerations) and *Tomczak v. City of Chicago, supra* (upholding politically motivated dismissal of second-ranking administrator in City of Chicago Water Department). *Upton*, 930 F.2d at 1214-15. A reasonably competent sheriff in December, 1986, however, should have been able to differentiate between the relatively high-profile, politically-sensitive positions involved in *Livas* and *Tomczak* and the position of deputy sheriff. Furthermore neither *Livas* nor *Tomczak* involved positions for which a merit-based employment system had been established pursuant to state law.

The Court of Appeals also incorrectly concluded that the Eleventh Circuit's holding in *Terry v. Cook, supra*, that political loyalty is an appropriate requirement for deputy sheriffs, provided a basis for granting qualified immunity to Respondent. *Upton*, 930 F.2d at 1217. *Terry* is not germane to the qualified immunity analysis in this case because it was decided more than two years after Petitioner was discharged. This Court has held that the objective reasonableness of a public official's action for purposes of a qualified immunity analysis must be assessed in light of the law which existed at the time the action was taken. *Anderson*, 483 U.S. at 639. In addition, *Terry* was decided in the context of Alabama's statutory

framework and public policy tradition which are vastly different from those involved in this case.

In December, 1986, the holdings of this Court in *Elrod* and *Branti* and the decisions of the Circuit Courts of Appeals in *Perry, Jones* and *Barrett* would have put a reasonable sheriff on notice that the First Amendment prohibited him from firing a deputy sheriff based upon his political affiliation. Moreover the existence of a merit commission system in Kankakee County, Illinois should have made it readily apparent to Respondent that political loyalty was not an appropriate criterion for discharging his deputies. Contrary to the conclusion of the Court of Appeals, Respondent in this case has no credible basis for asserting the defense of qualified immunity.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-3627

JACK L. THULEN,

Plaintiff-Appellee,

v.

MARVIN BAUSMAN, individually and in his official capacity as Sheriff of Carroll County, Illinois,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 88 C 20370 – **Stanley J. Roszkowski,** *Judge.*

No. 90-1559

DERRELL E. UPTON,

Plaintiff-Appellee,

v.

BERNIE C. THOMPSON, individually and in his capacity as Sheriff of Kankakee County,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 87 C 2176 – **Harold A. Baker,** *Chief Judge.*

ARGUED SEPTEMBER 27, 1990 – DECIDED APRIL 22, 1991

Before CUMMINGS, COFFEY and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. These two cases before us on appeal, while distinct lawsuits, raise the same legal issues from similar facts making them suitable for disposition in a single integrated opinion.

Both cases involve appeals from denials of qualified immunity on motions for summary judgment by Sheriffs sued by their discharged deputies. The deputies claim that their discharges were impermissibly motivated by the Sheriffs' opposition to their political party affiliations, thus infringing on their First Amendment rights. The Sheriffs insist that the deputies' right to be free from this type of patronage firing was not clearly established at the time of the terminations, and therefore they are protected from liability under a theory of qualified immunity. The district courts in each case disagreed and denied qualified immunity to the Sheriffs. We conclude that at the time of the deputies' firings it was not clearly established that the deputies were protected from patronage firings under the prevailing doctrines. We further conclude that political considerations are appropriate for determining qualifications for the position of deputy sheriff. We reverse the decisions of the district courts.

I. Nature of the Case in No. 90-1559 (Upton)

In late August, 1986, Derrell Upton was hired as a probationary deputy sheriff in Kankakee County, Illinois.

In November, 1986, Sheriff Scroggins, a Republican, lost the sheriff's election to the defendant, Bernie Thompson, the Democratic candidate. The Sheriff's Department of Kankakee County serves a rural Illinois community and employs between 70 and 80 deputy sheriffs. Thompson was sworn in as Sheriff on December 1, 1986. On December 6, 1986, Thompson terminated Upton. At the time of his termination, Upton was a probationary deputy, subject to at-will dismissal by the Sheriff (Ill. Rev. Stat. Ch. 125, ¶ 160 (1985)). Upton, an active member of the Kankakee County Republican Party, alleges that his termination resulted from his failure to support the Democrat Thompson for Sheriff in the November 1986 election and was in retaliation for his political affiliation in general.

During the campaign for Sheriff, Upton personally supported the incumbent Sheriff Scroggins in his bid for re-election and displayed a Scroggins bumper sticker on his car. During that same time Upton held the politically influential post of vice-president and acting president of the local chapter of the Illinois Fraternal Order of Police. Although Upton urged neutrality, the union members, by a majority vote, decided to endorse Sheriff Scroggins. In his capacity as a union official, Upton was questioned by reporters concerning the endorsement. Upton was clearly a political adversary of Thompson's, and was in a position to organize political opposition to Thompson.

Upton brought a civil rights action against Sheriff Thompson pursuant to 42 U.S.C. § 1983 alleging that his dismissal was an impermissible punishment for his exercise of his First Amendment right to support the incumbent Sheriff Scroggins in the 1986 election. Although Sheriff Thompson denies the allegations of any political

motivation in Upton's firing, for the sake of Thompson's affirmative defense of qualified immunity, the parties have stipulated that Thompson fired Upton for political reasons.

Sheriff Thompson moved for summary judgment on the grounds of qualified immunity, arguing that the termination of a deputy sheriff in 1986, even for political reasons, did not violate Upton's clearly established constitutional rights. The district court concluded such rights were clearly established and denied the Sheriff's motion for summary judgment. Sheriff Thompson appeals the denial of qualified immunity.

II. Nature of the Case in No. 89-3627 (Thulen)

The Carroll County Sheriff's Department is a small, rural office located in Mt. Carroll, Illinois. It employs only four full-time deputy sheriffs and 16 full-time employees.

The plaintiff, Jack Thulen, served as a Deputy Sheriff for Carroll County for 13 years under the administration of his brother and former Sheriff Jimmie Thulen, a Democrat. Jack Thulen's tenure began on the same day his brother Jimmie assumed the office of sheriff in 1970, and he served as chief deputy until Sheriff Thulen was defeated in the November 4, 1986 sheriff's election by the Republic candidate, Marvin Bausman.

During the 1986 campaign, Jack Thulen actively supported his brother's bid for re-election. In addition to being an outspoken supporter of Jimmie's candidacy, Jack Thulen helped the campaign by putting up signs and attending fundraisers. In his campaign against Jimmie

Thulen, Marvin Bausman espoused a platform which was very critical of the Thulen administration. Specifically, candidate Bausman charged the incumbent administration with imprudent use and waste of public funds, poor leadership and lack of aggressive law enforcement.

Upon assuming office on December 1, 1986, Sheriff Bausman terminated Jack Thulen, who then filed a § 1983 civil rights case against Bausman in both his individual and official capacities. Thulen claims he was fired for political reasons in violation of his First Amendment rights to freedom of association and expression. Bausman sought summary judgment on all allegations, including a claim for qualified immunity on the individual charge. The district court denied summary judgment on all claims.

III. ANALYSIS

A. Standard of Review

Both Sheriffs appeal the district court denials of their summary judgment motions for qualified immunity. A district court's denial of a claim of qualified immunity is an immediately appealable final decision within the meaning of 28 U.S.C § 1291. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). This court reviews *de novo* a district court's summary judgment determination in qualified immunity cases where the facts are not disputed. *Jackson v. Elrod,* 881 F.2d 441,443 (7th Cir. 1989). Upon appeal this court determines whether the substantive law has been properly applied by the district court. *Id.*

B. Qualified Immunity

Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "governmental officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. "For executive officers in general, . . . qualified immunity represents the norm." *Id.* at 807.[1] The right the official is alleged to have violated must have been "clearly established" in a "particularized" way and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In *Davis v. Sherer*, 468 U.S. 183 (1984), the Supreme Court stated that "whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of his conduct as measured by reference to clearly established law.' " *Id.* at 191 (quoting *Harlow*, 457 U.S. at 818). The principle behind the doctrine is that " '[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful.' " *Greenberg v. Kmetko*, 840 F.2d 467, 472 (7th Cir. 1988) (quoting *Harlow*, 457 U.S. at 818).

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[1] *Harlow* was a suit against federal, not state officials, but as the Supreme Court stated in deciding the case, "it is untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 457 U.S. at 818, n.30.

See also Cygnar v. City of Chicago, 865 F.2d 827, 843 (7th Cir. 1989). What is important, in the final analysis, is "whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir. 1988) (quoting *Wade v. Hegner*, 804 F.2d 67, 71 (7th Cir. 1986)).

In further characterizing the suitability of applying qualified immunity, this court stated that "[q]ualified immunity is designed to shield from civil liability 'all but the plainly incompetent or those who knowingly violate the law.' " *Hughes v. Meyer*, 880 F.2d 967, 971 (7th Cir. 1989) (quoting from *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Immunity should be applied unless "it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987). To prove the presence of a clearly established constitutional right, the plaintiff must point to "closely analogous cases" decided prior to the defendants' challenged actions. *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988).

The district courts rejected the Sheriffs' arguments that under these guidelines they should be held immune from suit for the politically motivated firings of deputy sheriffs. The district courts in both cases found that the firings violated the discharged employees' "clearly established" First Amendment rights under *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and their progeny. According to the district courts, at the time the firings occurred (December 1986) it was clearly established under the First Amendment that a deputy sheriff could not be fired because his political affiliation and

activity was different than the sheriff's. As such, the firing of the deputies in opposition to the "clearly established" prohibition vitiated the Sheriffs' immunity from suit for damages under 42 U.S.C. § 1983.

As the district court accurately notes in its order in the *Thulen* case, the law "is unsettled"[2] as to whether partisan political affiliation is a proper job requirement for deputy sheriffs. The propriety of politically based firings of deputy sheriffs (as well as other positions) has received conflicting and confusing treatment when federal courts attempt to apply *Elrod* and *Branti* principles. In his dissent in *Branti,* Justice Powell predicted the problem we now confront: "The standard articulated by the court [in *Branti*] is framed in vague and sweeping language. Elected and appointed officials at all levels . . . no longer will know when political affiliation is an appropriate consideration in filing a position." 445 U.S. at 524.

In her 1989 article titled "A Decade of *Branti* Decisions: A Government Official's Guide to Patronage", Susan Martin outlines the variations and conflicts among the federal circuits in their application of *Branti* to patronage dismissal cases. Martin catalogues the cases decided under *Branti,* and reveals that there is a large middle ground of public employment for which the propriety of patronage dismissal receives ambiguous treatment under the *Branti* test. Martin writes: "After *Branti,* the test is whether party affiliation is an appropriate

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[2] Judge Roszkowski's unpublished order of November 27, 1989, at 6.

requirement for effective job performance. Jobs requiring party affiliation for effective job performance may or may not be of the policymaking or confidential variety." 39 Am. U. L. Rev. 11, at 22 (1989). That is, between the strictly menial government worker (who, under *Elrod* and *Branti*, is clearly and completely protected from patronage firing) and the policymaker/confidential assistant (whose protection from patronage firing is non-existent), there is a range of government positions for which the propriety of patronage firing has depended largely on the courts' juggling of competing constitutional and political values. The results have not been consistent. The failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals creates a context in which the Sheriffs (absent a direct holding on the issue) could have no clear understanding as to whether the deputy sheriffs had any constitutional protection from a politically based discharge. The lack of clarity on this issue, as demonstrated by the analysis below, necessarily extends the protection of qualified immunity to the Sheriffs.

C. First Amendment Claim

The grant of qualified immunity to the Sheriffs properly depends upon whether the deputies' right to be free from politically based firings was clearly established. A number of Supreme Court and Seventh Circuit cases govern our thinking. In *Elrod v. Burns, supra,* the Supreme Court addressed the question whether dismissal of public employees for political reasons violates the First Amendment. *Elrod* involved the dismissal of a number of non-

civil service employees of the Cook County, Illinois, Sheriff's Department by the newly elected Democratic sheriff. The employees (none of whom were deputy sheriffs) were fired because they were not members or functionaries of the Democratic Party. In examining the role of the First Amendment in *Elrod*, the Court analyzed the history and purpose of the patronage system in American government. The Court acknowledged the administrative importance of having an elected official select employees who would be loyal to the official and his electoral mandate. Derivative of this would be greater efficiency in government with the introduction of politically compatible and highly motivated workers disinclined to subvert the incumbent administration's efforts to govern effectively. Therefore, politically based firings of the opponent's sympathizers are necessary to make way for accommodating and cooperative employees.

Contrasted to this, the Court observed a strong constitutional legacy of protecting the individual's freedom of association and his right to meaningfully exercise his political beliefs. A patronage system would be offensive to the constitutional rights of the government worker whose ability to enjoy the benefit of public employment should not ordinarily be contingent on his coerced association with the dominant political party or on the sacrifice of his own political activity. To accommodate the conflicting demands for efficient and responsive government and the First Amendment rights of government workers, the Court limited patronage dismissals to "policymaking positions." In the Court's view, limiting patronage dismissals to policymaking positions would sufficiently "insur[e] . . . that representative government

not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." 427 U.S. at 367. "Non-policymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party." *Id.*

The *Elrod* Court did not provide precise guidance regarding who may be considered a policymaker suitable for patronage dismissal. Four years after *Elrod*, however, the Supreme Court in *Branti v. Finkel, supra*, revised the standard, stating: "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. In *Branti* the Court decided that the First Amendment prohibited a newly appointed public defender from discharging assistant public defenders because they did not have the proper political support of the preferred party. In holding that employment as a public defender cannot be conditioned upon allegiance to the controlling party, the Court noted that "the primary office performed by appointed counsel parallels the office of privately retained counsel, . . . the only responsibility of an assistant public defender is to represent individual citizens in controversy with the State . . . not the public at large. . . . " *Id.* at 519. Accordingly, assistant public defenders were protected under the First Amendment because the exclusive concern of that office is the legal needs of the individual

clients which are generally untainted by partisan political interests.[3]

Since *Branti*, the courts of appeals have devised various tests for determining when "affiliation is an appropriate requirement" for employment or discharge. One major authority in the Seventh Circuit interpreting *Elrod* and *Branti* is *Tomczak v. City of Chicago*, 765 F.2d 633, *cert. denied*, 474 U.S. 946 (1985). *Tomczak* antedates the firings in the present controversy and is therefore significant to this case. In *Tomczak*, this court reversed a district court decision and held that a long-term employee who had worked his way up to the second-highest ranking position in Chicago's water department was not protected by the First Amendment's prohibition on patronage firings. This Court noted that "*Elrod and Branti* require examination of the *powers* inherent in a given office, as opposed to the functions performed by a particular occupant of that office." *Id.* at 640 (citations omitted) (emphasis added). In specifying the official powers to be examined this court explained: "[t]he test is whether the position held by the individual authorizes, either directly or indirectly, *meaningful input* into government decision making on issues where there is room for principled disagreement on goals *or their implementation.*" (emphasis added). *Id.* at 641, citing *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 445 U.S. 1021 (1982).

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[3] The *Branti* Court admitted that the official duties of a public prosecutor presented a different question, but declined to address it. 445 U.S. at 519 n.13. This issue is reached in *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983), and is discussed *infra*.

In *Tomczak*, we disagreed with the district court's contention that the plaintiff was not subject to patronage firing because the goal of the Water Department was to provide service to all residents without regard to politics and thus "there could be no principled disagreements about the basic policies of the Department. Cf. *Jones v. Dodson*, 727 F.2d at 1338." *Tomczak*, 765 F.2d at 641. "This," we said, "is an unduly myopic view of the role of politics in the seemingly apolitical context of universal provision of services." *Id.* We suggested that politics always affect the implementation of policy:

> The primary function of any local governmental entity is the provision of services such as *police* and fire protection. . . . Elections often turn on the success or failure of the incumbent to provide these services, and as campaigns develop, the opposing sides put forth varying proposals about how best to provide services. While the ultimate goal of all sides might be the same, there is clearly room for principled disagreement in the development *and implementation* of plans to achieve that goal. Therefore, the fact that plaintiff's position concerned the provision of water to all citizens does not mean that the Water Department had no goals about which there could be principled disagreements.

Id. at 641 (emphasis added).

In an earlier case, *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983), this court confronted the "antithetical question" to that of *Branti:* whether political considerations can be an appropriate requirement for the effective performance of a public prosecutor's duties (*Branti* concerned public defenders). This court unequivocally declared, "[w]e

believe the answer to this question is clearly 'yes.' " *Id.* at 801. In so holding, this court wrote:

> A public prosecutor . . . exercises broad public responsibilities in the performance of his duties. A prosecutor's "client" is not an individual, but society as a whole. And the prosecutor has the broad discretion to set whatever policies he or she believes necessary to protect the interests of society.
>
> One of the problems faced by a prosecutor . . . is that his policies are implemented by subordinates. Indeed, an Assistant State's Attorney may, in carrying out his or her duties, make some decisions which will actually create policy. . . . The public interest in the efficient administration of justice requires that decisions made by such assistant prosecutors conform with the broad objectives chosen by the prosecutor.

Id. at 800-801. For the above reasons, the prosecutor was "entitled to demand absolute loyalty from his assistants" and was permitted to dismiss anyone in whom he "lost confidence . . . for whatever reason," including political reasons. *Id.* at 801.

Although this circuit has not specifically addressed the propriety of a sheriff's dismissing a deputy for political reasons, *Tomczak and Livas* provide definite guidance in resolving the question. In both *Tomczak and Livas*, nonpolicymaking officials were deemed subject to politically based firing because they were vested with substantial discretionary authority in the implementation of the policy goals of elected officials. The facts of these present cases suggest that a deputy sheriff helps to implement his

superior's policies to the same degree as an assistant prosecutor or a deputy city commissioner, making deputies suitable for similar treatment under the First Amendment.

Like the prosecutor, the Sheriff is elected by the voters in a county to serve the public at large. His selection is based significantly on the popular approval of his expressed political agenda. The Sheriff, like the prosecutor, has "broad discretion to set whatever policies he or she believes necessary to protect the interest of that society." *Livas*, 711 F.2d at 800. Particularly in a small department, a Sheriff's core group of advisers will likely include his deputies. A deputy sheriff, in implementing the Sheriff's basic policy, will "make some decisions that will actually create policy." *Id.* at 801. As with the assistant deputy prosecutor in *Livas*, deputies on patrol or other assignment frequently work autonomously, giving them wide latitude and discretion in the performance of their duties and in the implementation of department goals. In order to promote public confidence in law enforcement, the Sheriff depends on his deputies to publicly project his competence and the competence of the office. Deputies are also expected to provide the Sheriff with truthful, accurate and beneficial information which he needs to make decisions and administer his office. While the circumstances of the Sheriff departments do no present an employment situation identical to a prosecutor's office, or that of a city water commissioner's, the position of these deputy sheriffs seems to fit within the *Branti*, *Tomczak*, and *Livas* exceptions to the prohibition on patronage firings, eroding any belief that the deputies' right to be free from political firing had been "clearly established."

Given the dependency of the sheriff (and his political survival) on his deputies' job performance, it is understandable why a sheriff might believe that party loyalty is an appropriate consideration for a deputy sheriff. This conclusion is especially true in the case of Jack Thulen, who was the outgoing sheriff's brother and chief deputy in a very small department for many years. Thulen took a high profile in a hotly contested campaign which involved critical policy disputes relating to the proper operation of the Sheriff's Department. Thulen's political involvement extended beyond mere party affiliation; it included active opposition to Marvin Bausman, who became the newly elected Sheriff. To the voting public this could make Thulen appear hostile and unreliable in carrying out the policies of the new Sheriff. Deputy Upton, while apparently not as active (or at least as high profile) in campaign events as Jack Thulen, had certainly made his opposition to candidate (later Sheriff) Thompson well known. In addition, Upton's leadership of a policemen's union which opposed Thompson's candidacy made it questionable whether he could execute Thompson's policies. Even though Thompson's department was larger, thus diluting the potential disruptiveness of one deputy's opposing political alignment, *Tomczak and Livas* would still provide a reasonable legal foundation for the sheriff to terminate a deputy whom he concluded would interfere in carrying out his stated policies based upon that deputy's prior political activity. Thus it was not clearly established at the time of Upton's and Thulen's discharges that deputy sheriffs were protected from patronage firings under *Elrod* and *Branti*.

The deputies, however, claim that the *Tomczak* and *Livas* analyses are irrelevant because *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986), directly answers in their favor the question of whether *Elrod* and *Branti* apply to deputy sheriffs. In *Perry*, a case decided about six months before the deputies' discharges, this court affirmed the sufficiency of a jury's verdict awarding damages in favor of a deputy sheriff in Wisconsin who was suspended and later discharged from his position, allegedly in retaliation for his decision to run against the defendant, the incumbent sheriff, for the office of Sheriff. The deputies suggest that by upholding the jury's verdict, which included punitive damages for the firing, this court implicitly held that the plaintiff's political activity was constitutionally protected and he was free from reprisals.

Perry, however, did not involve an *Elrod-Branti* analysis. Rather, the defendant in *Perry* challenged whether there was sufficient evidence to show that he terminated Perry for political reasons. This court imposed the usual heavy burden on the defendant to show there was no evidence that Perry's political activities were a substantial factor in the decision to terminate him. The defendant sheriff apparently did not raise and this court appropriately did not address the patronage issue or the immunity question, which would have required an *Elrod-Branti* analysis similar to those presented in *Livas* and *Tomczak*. Thus, *Perry* presents no basis for claiming a clearly established precedent preventing a sheriff from firing a deputy for political reasons. Moreover, while the exact grounds for the jury's verdict in *Perry* are not specified, there is a suggestion in the opinion that the deputy's firing took place in violation of an effective civil service ordinance.

Id. at 283. In all likelihood, this ordinance would have given the plaintiff in *Perry* greater protection from patronage firing than the unprotected plaintiffs in this present action.[4]

Other circuits have split on the question of whether a deputy sheriff is protected from political discharge. In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the Fourth Circuit, applying *Branti*, did not believe that the duties of a deputy sheriff, "could be found to involve policymaking related to 'partisan interests' and to involve access to

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[4] Present-day realities are that some deputy sheriffs are protected by some form of civil service laws and regulations which require due process and prevent political and other seemingly arbitrary terminations. While exceptions to the trend may keep this issue alive, the continuing close divisions in the courts emphasize that statutes and contracts are a much more viable method of job protection than reliance on blurry constitutional lines drawn by the courts. See for example Ind. Code § 36-8-10-11, which states in part:

> (c) A county police officer [deputy sheriff] may not be dismissed, demoted, or temporarily suspended because of political affiliation nor after the office's probationary period, except as provided in this section. An officer may:
>
> (1) be a candidate for elective office and serve in that office if elected;
>
> (2) be appointed to an office and serve in that office if appointed; and
>
> (3) except when in uniform or on duty, solicit votes or campaign funds for the officer or others.

See also Wis. Stat. 59.21 8(b)(1); but see Ill. Rev. Stat. ch. 34, ¶859-1, titled Merit System for Deputy Sheriffs, repealed by P.A. 81-1475 eff. Jan. 1, 1981.

confidential information bearing . . . on partisan political concerns . . . no matter what size the office, or the specific position of power involved, or the customary intimacy of the associations within the office, or the undoubted need for mutual trust and confidence within any law enforcement agency. . . . On this basis we hold that if [the deputy sheriff's] discharge was solely because of his political party affiliation, it could not as a matter of law be justified under the *Branti* test." *Id.* at 1338 (emphasis added). But if the deputy's political *activity* was the basis for discharge, *Jones* would apply a more open-ended "balancing" inquiry.

This circuit in *Tomczak* and *Livas* has acknowledged a greater role for loyalty among those charged with the implementation of government programs than that expressed in *Jones*, although *Jones* did seem to allow considerable leeway for sanctioning combative political activity as opposed to mere political affiliation. We have permitted patronage dismissals to accommodate the need for loyalty in cases where loyalty is essential in the transmission of services. Unlike the court in *Jones*, this court, in determining whether political affinity is an appropriate job requirement for a position, has examined factors like "the specific position of power involved," (see *Tomczak*) the "customary intimacy of association with the office," (see *Livas*) and the "need for mutual trust and confidence" (see *Livas*).

More recently in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the Eleventh Circuit, applying *Branti*, held that:

> The closeness and cooperation required between sheriffs and their deputies necessitates

> the sheriff's absolute authority over their appointment and/or retention.
>
> Under the *Elrod-Branti* standard, loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff. . . . We can find no less restrictive means for meeting the needs of public service in the case of the sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who did not support him.

Id. at 377. While a circuit split is not helpful in determining whether or not a deputy sheriff is protected by the First Amendment from patronage firing, such a split is indicative of the fact that the deputy sheriff's rights in this regard are currently unsettled as a matter of constitutional law and therefore were not "clearly established" at the time of the deputies' firings.[5]

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[5] The cases now before us are simplified by other factors not now on review but which were in place when each sheriff made his decision. In *Upton*, the terminated employee was a "probationary deputy" subject to "at will" dismissal by the sheriff under Ill.Rev.Stat. ch. 125 ¶160 (1985). In *Thulen*, the Carroll County Board, two weeks before the new sheriff took office, withdrew civil service protection for the deputies by abolishing the Commission for Deputy Sheriffs. These are affirmative indications that would make it plausible for a sheriff to believe that the deputy sheriffs had no statutory or contractual rights to their jobs and could legally be discharged. These would be in addition to the signals from *Branti*, *Tomczak* and *Livas*, suggesting that the nature of the deputy sheriff's job makes party affiliation a suitable job requirement.

Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990), has recently complicated the patronage question by extending the termination rule of *Elrod* and *Branti* to all government personnel actions. "We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support." *Rutan*, 110 S.Ct. at 2739. But the fundamental rule of *Elrod* and *Branti* remains the same, presumably as interpreted in this circuit by *Livas* and *Tomczak*. With the expanded coverage, new questions naturally arise. In the sheriffs' setting, promotion, transfer, recall, and hiring decisions within the Sheriff's Department could come under the same constitutional scrutiny as the terminations we examine here, unless otherwise controlled by statute, regulation, or contract. Justice Scalia in his dissent to *Rutan* (joined by three other Justices), highlights the impossibility of the courts' and government officials' position when trying to apply *Branti*: "interpretations of *Branti* [within the federal circuits] are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision." *Id.* at 2756. Justice Scalia in his dissent follows this observation with a litany of federal cases which itemize the various government positions in which one is or is not protected from patronage dismissals under *Branti* and *Elrod*. The comparison of the itemized positions receiving different treatment under *Branti* illustrate "that the tests used to implement *Branti* have produced inconsistent and *unpredictable results*." *Id.* at 2756-2757, including nn.5-21 (emphasis added). Truly, as Justice Scalia points out, the

indefiniteness of the applicable *Branti* standard has resulted in judicial confusion and inconsistency, a confusion that has naturally transpired to government officials having to apply *Branti*.

We conclude therefore that since the law was not clearly established in 1986 the sheriffs in these cases are protected by qualified immunity. What about 1991? As we noted in *Livas*, "The *Branti* court recognized that the pivotal inquiry is not whether a position is confidential or policymaking in character, but rather 'whether the hiring authority can demonstrate that [political considerations are] an appropriate requirement for the effective performance of the public office involved.' " *Livas, supra* at 800, quoting *Branti, supra* at 518. We are thus confronted with the same question faced in *Livas* – "whether [political considerations] can be an appropriate requirement for the effective performance" of a deputy sheriff's duties. *Id.* In this situation we believe the answer is yes. Based on this court's approval of political terminations in other contexts, we conclude that deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies.

In some states a politically silent deputy would officially align with a party simply by voting in the primary election.[6] This contrasts sharply with the politically active

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[6] In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Supreme Court noted: "21 States provide for 'closed' primaries of the classic sort in which the primary voter must be registered as a member of the party for some time

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deputy who, by vociferously campaigning for the loser, encounters Matthew 26:52: "All they that take the sword shall perish with the sword." State legislatures may choose to adjust state laws to protect some level of party affiliation or participation. Suffice it to say that under the First Amendment as interpreted by *Branti*, *Livas*, and *Tomczak*, a sheriff may use political considerations when determining who will serve as deputy sheriff. The judgments of the district courts with respect to the issue of qualified immunity are reversed. We further remand these cases to the district courts for proceedings consistent with this opinion.

REVERSED and REMANDED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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prior to the holding of the primary election . . . Sixteen States allow a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary. See . . . Ill.Rev.Stat. ch. 46, ¶7-43(a) . . . IND. CODE § 3-10-1-6." *Id.* at 223 n.11.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit, Chicago, Illinois 60604

JUDGEMENT – WITH ORAL ARGUMENT

Date: April 22, 1991

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge

Honorable John L. Coffey, Circuit Judge

Honorable Daniel A. Manion, Circuit Judge

No. 89-3627

JACK L. THULEN,
Plaintiff-Appellee

v.

MARVIN BAUSMAN, individually and in his official capacity as Sheriff of Carroll County, Illinois,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Western Division
No. 88 C 20370, Judge Stanley J. Roszkowski

No. 90-1559

DERRELL E. UPTON,
Plaintiff-Appellee

v.

BERNIE C. THOMPSON, individually and in his capacity as Sheriff of Kankakee County,
Defendant-Appellant

Appeal from the United States District Court for the Central District of Illinois, Danville Division
No. 87 C 2176, Chief Judge Harold A. Baker

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgments of the District Court in these causes appealed from be, and the same are hereby, REVERSED and REMANDED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-3627

JACK L. THULEN,

Plaintiff-Appellee,

v.

MARVIN BAUSMAN, individually and in his official capacity as Sheriff of Carroll County, Illinois,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 88 C 20370 – **Stanley J. Roszkowski,** *Judge.*

No. 90-1559

DERRELL E. UPTON,

Plaintiff-Appellee,

v.

BERNIE C. THOMPSON, individually and in his capacity as Sheriff of Kankakee County,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 87 C 2176 – **Harold A. Baker,** *Chief Judge.*

On Petition for Rehearing and Rehearing En Banc

REHEARING AND SUGGESTION FOR
REHEARING EN BANC DENIED – JULY 26, 1991

Plaintiffs-Appellees Jack L. Thulen and Derrell E. Upton filed petitions for rehearing and suggestions for rehearing en banc on May 6, 1991 and May 21, 1991 respectiveiy. All members of the panel voted to deny the petitions for rehearing. A vote of the active members of the court was requested, and a majority of the active judges have voted to deny a rehearing en banc. Circuit Judges Wood, Jr., Cudahy, Posner, and Ripple voted to grant rehearing en banc. The petition for rehearing is therefore DENIED.

RIPPLE, *Circuit Judge*, with whom WOOD, JR., CUDAHY, and POSNER, *Circuit Judges*, join, dissenting. I respectfully dissent from the denial of rehearing en banc. In both cases, sheriffs appealed the denial of qualified immunity on motions for summary judgment. Such appeals are deemed immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The panel holds that "since the law was not clearly established in 1986 the sheriffs in these cases are protected by qualified immunity." *Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991). But, despite the quasi-interlocutory nature of the appeal, the panel does not stop there. Rather, it goes on to hold that "deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Id.*

The plaintiffs contend that this latter holding was beyond the scope of proper appellate review. *See* Upton's petition for rehearing at 13-15; *cf.* Thulen's petition for rehearing at 3-4 (contending that panel opinion improperly decided appeal despite disputed factual issues). I recognize that there is precedent to support this court's authority to exercise discretionary jurisdiction over aspects of the case other than the immunity defense itself. There are indeed instances in which a pure question of law is presented, *see Siegert v. Gilley*, 111 S.Ct. 1789 (1991), or in which considerations of judicial economy make such a course manifestly reasonable. *See Duke v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990). Nonetheless, such discretion should be exercised sparingly. In this case, the panel has used the qualified immunity appeal to hand down a sweeping advisory opinion on the power of sheriffs to fire their deputies. Although – perhaps *because* – it is so sweeping, its scope is also unclear. Does it apply only throughout Illinois, or perhaps throughout the Seventh Circuit? Only when deputies are politically active, or whenever they have political allegiances that differ from those of their superiors? More fundamentally, the panel opinion fails to reconcile its result with cases that hold that whether a particular government position has functional attributes that trigger first amendment protection is an issue of fact.[1] Indeed, the panel's second holding

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[1] *See Soderbeck v. Burnett County*, 752 F.2d 285, 288-89 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985); *Shondel v. McDermott*, 775 F.2d 859, 864 (7th Cir. 1985) ("Everyone seems to have assumed that as the head of a major city department Kwolek must have been a policy-making officer, but we hesitate to so

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rests largely on citations to *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983), a case in which this court was reviewing findings entered by the district court after a full bench trial.

The panel's decision on the qualified immunity issue is correct. The remainder of the decision raises serious questions of methodology and substance. The entire court should determine: 1) when it is appropriate to go beyond the qualified immunity issue on interlocutory appeal; 2) whether we shall abandon our precedent requiring findings tailored to the particular position at stake; and 3) whether the broad holding of the panel ought to govern cases other than this one.

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hold as a matter of law without any evidence about the structure of Hammond city government."); *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981) ("the trial judge erred in deciding as a matter of law that Dumas did not occupy a policymaking position"), *cert. denied*, 455 U.S. 1021 (1982); *Stegmaier v. Trammeli*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979) ("the question of whether an employee is a policymaker or falls within the policymaker, confidential employee exception to *Elrod* is a question of fact") (citing cases). *But see Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (affirming Rule 12(b)(6) dismissal of section 1983 claim brought by deputy sheriffs); *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984) (holding as matter of law that deputy sheriff could not be discharged solely because of party affiliation).

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DERRELL E. UPTON,	)	
Plaintiff,	)	
vs.	)	No. 87-2176
BERNIE C. THOMPSON, ETC.,	)	
Defendant.	)	

ORDER
(Filed Feb. 21, 1990)

This matter is before the court for pretrial conference and for consideration of the defendant's objection to the recommendation made by the Magistrate to deny the defendant's motion for summary judgment. The court has considered the recommendation, the position of the plaintiff and defendant on the recommendation, and heard the arguments of counsel. The court accepts and adopts the recommendation of the Magistrate.

The court rejects the Eleventh Circuit decision of *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). The court considers that decision as aberrant and in conflict with the holdings of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

The defendant also argues qualified immunity as a defense. The court concludes that on an objective basis the defendant in this case could not have claimed that the law prohibiting discharge of probationary employees for political reasons was not sufficiently clear in December,

1986, when the defendant discharged the plaintiff, to allow the defendant to claim the defense of qualified immunity. The Seventh Circuit has been consistent in following the *Elrod* and *Branti* decisions. In addition, the Seventh Circuit in *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986), ruled that a deputy sheriff could not be terminated from his position because of political affiliations. The *Perry* decision antedates by six months the action of the sheriff in this case.

The court adopts the Magistrate's recommendation. The defendant's motion for summary judgment is denied.

ENTER this 21st day of February, 1990.

/s/ Harold A. Baker
HAROLD A. BAKER
CHIEF U.S. DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT DANVILLE

DERRELL E. UPTON, Plaintiff,	)	
vs.	)	Case No. 87-2176
BERNIE C. THOMPSON, ETC., Defendant.	)	

TO: HONORABLE HAROLD A. BAKER
CHIEF UNITED STATES DISTRICT JUDGE

RECOMMENDATION
(Filed Dec. 14, 1989)

The plaintiff files suit pursuant to 42 U.S.C. § 1983 alleging that the defendant has deprived him of constitutional rights in discharging the plaintiff for political reasons. Now before the Court is the defendant's Motion for Summary Judgment (#30). The motion is fully briefed and pursuant to Local Rule 3 I have held a hearing. Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the motion be denied.

For the purposes of this motion, the basic facts of this case are not in dispute. In fact, the defendant's argument is premised on the truthfulness of the plaintiff's allegations. The plaintiff was hired by Kankakee County as a probationary deputy sheriff in August, 1986. The plaintiff was a Republican and the defendant a Democrat. In the 1986 election for Sheriff of Kankakee County, the plaintiff supported the incumbant [sic] William Scroggins, a Republican, who was ultimately defeated by the defendant Bernie Thompson, a Democrat. The defendant was elected in November, 1986 and sworn in as Sheriff on

December 1, 1986. On December 6, 1986, the plaintiff was called to the office of the defendant who then informed the plaintiff that he was terminated from his job as deputy. The defendant refused to give a reason why the plaintiff was being terminated. The plaintiff alleges that he was terminated solely on the basis of his political affiliation.

As the defendant invites the Court to assume the truth of the plaintiff's factual allegations, the defendant may prevail only if those allegations conclusively establish that the defendant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In essence the defendant asks the Court to rule that a political firing of a deputy sheriff is a permissable [sic] act under the First Amendment.

A discussion of political firings must begin with *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, non-civil-service employees of the Cook County, Illinois Sheriff's Office brought suit after they had been terminated by a newly elected Sheriff of a different political party. The Court in *Elrod* held that patronage dismissals of such employees violate the First and Fourteenth Amendments to the Constitution. It further held that political patronage could be considered only for employees occupying policy making positions. The *Elrod* decision was further expanded in *Branti v. Finkel*, 445 U.S 507 (1980). *Branti* was brought by Assistant Public Defenders who were terminated from their employment on the basis of their political affiliation. The Court in *Branti* expanded the concept of "policy-making position" by finding that an employer may consider political affiliation only when he can demonstrate that party affiliation is "an appropriate requirement for

the effective performance of the office." The Court in *Branti* found that such affiliation was not a requirement for Assistant Public Defenders.

The Seventh Circuit has followed *Elrod* and *Branti* in a series of cases which hold as a general principle that dismissals of public employees for reasons of political patronage are violations of the First Amendment. *See* cases collected in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989); Soderbeck v. Burnett, 752 F.2d 285 (7th Cir. 1985) (involving Sheriffs' Office employees); *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977); *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986). *Perry v. Larson* was a case in which a deputy sheriff successfully sued because of his political termination. *Perry* was decided June 23, 1986. The only real discussions in these cases have been over whether the particular job involved was a policy-making or confidential position under *Elrod* and *Branti*. The Court can find no retreat in the Seventh Circuit from the basic propositions [of] *Elrod* and *Branti*.

The defendant relies on an Eleventh Circuit case, *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) which upheld the political firing of a deputy sheriff in Alabama. I have considered the *Terry* case and find that it is factually distinguishable, even if the Court were to agree with the legal interpretations of the Eleventh Circuit. *Terry's* distinguishable factual cornerstone is the Alabama statute, which allows and even encourages political hiring and firing of deputy sheriffs. In Illinois the statutory scheme is quite different. Kankakee County apparently has opted to follow the Merit Commission selection of deputy sheriffs as outlined in Ill. Rev. Stat., Chapter 125, Par. 160 *et seq*. The plaintiff was hired in accordance with that merit

selection system in 1986. That scheme specifically forbids political considerations when hiring deputies under the system. *See,* par. 162. The Illinois legislature has most certainly established its intent that county law enforcement agencies are to be professional agencies and not political bodies. The arguments of the defendant in this case would return Illinois to the "good ol' boy" days when the *entire* Sheriff's Department would turn over with the election of a new sheriff. This scheme would end merit selection and affirmative action plans and eliminate years of progress toward professional law enforcement agencies. The Court is not willing to follow *Terry.*

The plaintiff concedes that he was a probationary employee and therefore does not have a property interest in his public employment. However, even a probationary employee with no property interest cannot be terminated for actions protected by the First Amendment. *Endicott v. Huddleston,* 644 F.2d 1208 (7th Cir. 1980).

The defendant further argues that he is entitled to qualified immunity under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987). These cases hold that a government official will be shielded from individual liability for damages if his conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Harlow* and *Anderson* establish an *objective* standard for review of qualified immunity. If the Court finds that the rights were clearly established then qualified immunity does not apply regardless of the subjective knowledge of the individual defendant.

In this case the defendant argues that since even the Federal Circuits can't agree on the interpretation of *Elrod* as it applies to a deputy sheriff, then this defendant could not be held reasonably knowledgeable of those rights and so is immune under *Harlow* and *Anderson*. As discussed above, the Eleventh Circuit case appears to stand alone in the Federal Circuit Courts and is factually quite different from the one at bar. The Seventh Circuit has been quite consistent in following *Elrod* and *Branti* as it applies to public employees. As also noted above, *Perry v. Larson*, which was a case involving deputy sheriffs, was decided by the Seventh Circuit in 1986 prior to the termination of this plaintiff.

The only Seventh Circuit cases that uphold a political firing are those whose facts establish that the employee in question held a policy making position or a position which objectively demands total political loyalty. *See*, dictain [sic] *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983); *Newcomb v. Brennan*, 558 F.2d 825, 830 (7th Cir. 1977). The Court notes that none of these cases involve a deputy sheriff. Accordingly, I find that the qualified immunity argument made by the defendant does not apply in this case.

If the defendant wishes to argue that the plaintiff occupied such a policy making or confidential position as defined by *Elrod* and *Branti*, he must do so on the facts, and those facts are not before the Court at this time.

In summary, I find that the Seventh Circuit has been consistent in its interpretations of *Elrod* and *Branti*

upholding the right of a public employee not to be terminated for political reasons except under limited circumstances, none of which apply to the facts as presented here. Therefore, the defendant's arguments that the plaintiff's complaint fails to state a claim for which relief can be granted and that the defendant is entitled to qualified immunity are without merit and must fail.

Accordingly, I recommend that the defendants' [sic] Motion for Summary Judgment (#30) be DENIED.

The parties are advised that any objection to this recommendation must be filed in writing with the Clerk within ten (10) working days after service of this recommendation. *See*, 28 U.S.C. § 636(b)(1). Failure to object will constitute a waiver of objections on appeal.

ENTER this 14th day of December, 1989.

/s/ Robert Kauffman
ROBERT J. KAUFFMAN
UNITED STATES MAGISTRATE

Nos. 91-691 & 91-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JACK L. THULEN,

Petitioner,

v.

MARVIN BAUSMAN, Individually and in his official capacity as Sheriff of Carroll County, Illinois,

Respondent.

and

DERRELL E. UPTON,

Petitioner,

v.

BERNIE C. THOMPSON, Individually and in his official capacity as Sheriff of Kankakee County, Illinois,

Respondent.

Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE PROHIBITIONS AGAINST POLITICAL AFFILIATION FIRINGS ESTABLISHED IN *ELROD/BRANTI* DO NOT APPLY TO ILLINOIS DEPUTY SHERIFFS WHO ACTIVELY CAMPAIGN AGAINST INCOMING SHERIFFS?

2. WHETHER THE SEVENTH CIRCUIT'S RESOLUTION OF THE FIRST AMENDMENT ISSUE CREATED AN INTER-CIRCUIT SPLIT OF AUTHORITY ON THE SCOPE OF PROTECTIONS ACCORDED DEPUTY SHERIFFS UNDER *ELROD/BRANTI*?

3. WHETHER THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE UNSETTLED STATE OF THE LAW ON POLITICAL FIRINGS OF DEPUTY SHERIFFS ENTITLED THE RESPONDENTS TO QUALIFIED IMMUNITY?

4. WHETHER THIS HONORABLE COURT SHOULD TAKE THIS OPPORTUNITY TO REVISIT THE FIRST AMENDMENT QUESTIONS DECIDED IN *ELROD/BRANTI* AND RETURN THE DISPUTE OVER PATRONAGE PRACTICES TO THE STATES?

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RELEVANT STATUTES

Ill. Rev. Stat., ch. 125, para. 3 (1985) provides that:

> [The Sheriff] shall also, before entering upon the duties of his or her office, take and subscribe the oath or affirmation prescribed by section 3 of Article XIII of the Constitution, which shall be filed in the office of the county clerk of his or her county.

Ill. Rev. Stat. ch. 125, para. 9 (1985) provides that:

> Each deputy shall, before entering upon the duties of his or her office, take and subscribe an oath or affirmation, in like form as is required of sheriffs, which shall be filed in the office of the county clerk.

Ill. Rev. Stat. ch. 125, para. 12 (1985) provides that:

> Deputy sheriffs, duly appointed and qualified, may perform any and all the duties of the sheriff, in the name of the sheriff, and the acts of such deputies shall be held to be acts of the sheriff.

Ill. Rev. Stat. ch. 125, para. 13 (1985) provides that:

> The sheriff shall be liable for any neglect or omission of the duties of his or her office, when occasioned by a deputy or auxiliary deputy, in the same manner as for his or her own personal neglect or omission.

Ill. Rev. Stat., ch. 125, para. 17 (1985) provides that:

> Each sheriff shall be conservator of the peace in his or her county, and shall keep the same, suppress riots, routs, affrays, fighting, breaches of the peace, and prevent crime; and may arrest offenders on view, and cause them to be brought before the proper court for trial or examination.

Ill. Rev. Stat., ch. 125, para. 82 (1985) provides that:

> It shall be the duty of every sheriff, coroner, and every marshall, policeman, or other officer of any incorporated city, town, or village, having the power of a sheriff, when any criminal offense where breach of the peace is committed or attempted in his or her presence, forthwith to apprehend the offender and bring him or her before a judge, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants and other process to him or her lawfully directed.

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JACK L. THULEN,

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Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Respondents' brief in opposition to Petitioners' petitions for *certiorari* is divided into four sections and begins with an analysis of the Seventh Circuit's conclusion that Petitioners' dismissals were permissible under the first amendment because deputy sheriffs occupy positions for which political affiliation is an appropriate requirement. To support that conclusion, Respondents focus essentially on the broad discretionary authority accorded a deputy's duties under Illinois law, and on the fact that these Petitioners engaged in active political opposition against the Respondents in the 1986 Sheriffs' elections in Carroll and Kankakee Counties.

In light of that active politicking, Respondents would have been justified in viewing with skepticism the prospect that such adversaries would effectively embrace the new Sheriffs' platforms and policies. When Petitioners' political activity is considered in conjunction with a deputy's broad statutory mandate, it is revealed that the Petitioners occupied positions which could predictably be utilized to hamper or thwart the new Sheriffs' efforts to implement his reforms. Accordingly, the Seventh Circuit correctly concluded that the first amendment does not require incoming Sheriffs to retain deputies who actively and publicly opposed their candidacies during an election campaign.

Section II addresses the Petitioners' contentions concerning an inter-circuit split of authority on the scope of first amendment protections afforded deputy sheriffs under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). While the conflicting signals emanating from the circuits provides a plausible basis for

this Court's review, Respondents suggest that no true conflict is presented by the facts of these cases. The Petitioners' participation in active political opposition to Respondents removes this case from the reach of decisions in the Fourth and Fifth Circuits which hold only that deputies may not be terminated on account of mere political affiliation, rather than political activity. For that reason, any uncertainty in the circuits need not be resolved under the facts of the instant cases.

Section III involves Petitioner Upton's request that this Court review the Seventh Circuit's grant of qualified immunity in favor of Respondent Thompson. Qualified immunity provides Respondent with an added layer of insulation from damages liability and can be overcome only by a showing that it was clearly established as a constitutional matter in 1986 that deputy sheriffs could not be fired for political reasons. Even if this Court questions the lower court's resolution of the underlying first amendment issue, the presence of two courts of appeals decisions upholding the dismissal of deputy sheriffs for political reasons should soundly defeat any contention that the law clearly prohibited such dismissals in 1986.

The final section of the brief is perhaps the most important and raises an issue which need be considered only if the Court chooses to grant the writs. Drawing on Justice Scalia's suggestion in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2746-59 (1990) (Scalia, J., dissenting), Respondents contend that the federal courts' fifteen year foray into the arena of political dismissals has produced inconsistent results and caused a good deal of confusion for public employees and employers. Respondents further suggest that these problems stem not so much from mistakes encountered in applying *Elrod/Branti*, but rather, that they are attributable to the fact that only

through devices like civil service legislation and collective bargaining, rather than federal litigation under the first amendment, can an acceptable degree of certainty be achieved. For that reason, Respondents request that in the event the writs are granted, this Court should invite briefing and argument on whether the propriety of patronage practices should be returned to the wisdom of the various states. Respondents contend the question should be answered in the affirmative.

REASONS WHY *CERTIORARI* SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT PROPERLY FOUND THAT ILLINOIS DEPUTY SHERIFFS MAY BE DISMISSED FOR ACTIVE POLITICAL OPPOSITION TO AN INCOMING SHERIFF.

To show that the Seventh Circuit erred in refusing to extend the protections of *Elrod/Branti* to deputy sheriffs, Petitioners argue that the Seventh Circuit usurped the jury's factfinding function in concluding that Illinois deputy sheriffs are policymakers vested with broad discretion in their duties and having direct input into and impact upon the Sheriff's policymaking functions. To evaluate the validity of that argument, we must begin by identifying the specific task facing the lower court in assessing the scope of *Elrod/Branti*. Only then can the propriety of the lower court's conclusions be decided.

In assessing whether a public official occupies a position within the protections established in *Elrod/Branti*,

both the Seventh Circuit and other Courts of Appeals have focused on the powers inherent in the position itself, rather than the duties performed by a particular occupant of the office. *See for example, Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir.) *cert. denied*, 109 S.Ct. 132 (1988); *Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (*en banc*), *cert. denied*, 481 U.S. 1014 (1987); *Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988). Such an approach minimizes successive lawsuits by different occupants of the same position, provides job-holders with a higher level of certainty about whether a position is insulated against patronage firing, and allows employers the flexibility to vary a job-holder's duties without increasing the risk of litigation. *See* Martin, *A Decade of Branti Decisions: A Governmental Official's Guide to Patronage Dismissals*, 39 Am.U.L.Rev. 11, 38 (1989), *citing Greanias*, 842 F.2d at 958, and *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985).

Against a backdrop of that approach, we now consider the authorities available to the Seventh Circuit to guide its assessment of the duties performed by deputy sheriffs in Illinois counties. A brief review of those authorities fully supports the Court of Appeal's observation that Illinois deputy sheriffs are in a position to both fashion and frustrate a sheriff's policies. Specifically, deputy sheriffs perform a myriad of duties under Illinois law, including prevention of crime, arresting suspected criminals and keeping the peace. Ill.Rev.Stat. ch. 125, paras. 17, 82 (1985). Moreover, sworn deputy sheriffs take the same oath of office as Sheriffs (*Id.*, paras. 3, 9), and are empowered to perform any and all duties which the Sheriff himself performs. *Id.*, para. 12. Indeed, the acts of a deputy are deemed the acts of the Sheriff himself, who remains

statutorily liable for any of his deputies' negligent acts or omissions in the same manner as if they were his own. *Id.*, para. 13.

The broad scope of these duties reveals, without the need for a more specific factual inquiry, the importance of loyalty and cooperative teamwork between a Sheriff and his deputies. *See McMullen v. Carsen*, 754 F.2d 936, 939-40 (11th Cir. 1985) (need for high morale and internal discipline in law enforcement agencies); *Egger v. Phillips*, 710 F.2d 292, 325-28 (7th Cir.), (Coffey, J., concurring) (law enforcement agencies have paramount interest in teamwork, efficiency, cooperation, confidentiality and discipline), *cert. denied*, 464 U.S. 918 (1983). A new Sheriff should be able to depend upon his deputies for the enthusiastic coordination and implementation of policies and programs which served as the platform for his election. Indeed, Respondent Bausman's platform was especially critical of the Thulen administration and charged it with poor leadership and a lack of aggressive law enforcement (R. 29, Exhibit E).

In light of the preceding statutes and case law, the Seventh Circuit's general observations concerning the broad and discretionary nature of a deputy sheriff's duties were fully warranted. There was no need for a jury trial on the nature of a deputy sheriff's duties because those duties were readily ascertainable by reference to those authorities.

In concluding that the nature of a deputy's duties carries sufficient discretion and policymaking input so that an Illinois Sheriff is justified in removing political opponents, the Seventh Circuit did not write on a clean slate. Indeed, the Eleventh Circuit Court of Appeals has reasoned:

> To mandate that a Sheriff must accept the deputies that he finds in office simply because they belong to another political party even though he is totally re-

> sponsible for all their acts is incredible, and beyond the bounds of common sense.

Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989), *quoting Whited v. Fields*, 581 F.Supp. 1444, 1456 (W.D.Va. 1984).

In *Whited*, Federal District Judge Glen M. Williams of the Western District of Virginia further opined:

> [T]here is no higher benefit in all our system of government than that of preserving the benefit of a person's vote. All else is vanity. For this court to say that Sheriff Fields must hire his opponents as deputies to carry out his policies is the same as declaring the 1983 general election in Russell County void.

Whited, 581 F.Supp. at 1457.

While *Terry* upheld deputy dismissals on account of mere political affiliation, the instant Petitioners' active political support of the incumbents and opposition to the incoming Sheriffs reveals an additional compelling justification for Petitioners' dismissals. Indeed, Petitioner Thulen, who served as his brother's chief deputy for thirteen years, was an outspoken supporter of his brother's candidacy, and assisted with the campaign by putting up signs and attending fundraisers. *Thulen v. Bausman*, 930 F.2d 1209, 1211 (7th Cir. 1991). Petitioner Upton served as the public spokesperson for the local union chapter which publicly endorsed Respondent Thompson's opponent, and evidenced his personal support of Thompson's opponent by displaying a bumper sticker on his vehicle. *Thulen*, 930 F.2d at 1210-11.

Such high profile political opposition would justify an incoming Sheriff to view with skepticism the prospect that those opponents would effectively embrace the new Sheriff's platform and policies. Accordingly, the Seventh Circuit appropriately refused to inhibit the Respondents' abil-

ity to aggressively and freely implement their reforms by handcuffing them to a staff of deputies publicly committed to the policies of a former administration which were rejected by the electorate. A contrary ruling would only have served to unduly interfere with the operation of the electoral process and the mandate of the voters. Indeed, even those circuits which hold that deputy sheriffs may not be terminated for political affiliation have conceded that the result may be different when the deputy sheriff moves beyond mere affiliation to active support of a particular candidate. *See Jones v. Dodson*, 727 F.2d 1329, 1338-39 (4th Cir. 1984); *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987); *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984) (*en banc*).

Petitioner Thulen additionally faults the Seventh Circuit for even considering his political activity because Respondent Bausman has denied Petitioner's allegation that the decision to terminate was motivated by politics (Thulen's Petition, pp. 25-29). Petitioner suggests that Respondent may only rely upon his political activity if the Sheriff had asserted political activity as an affirmative defense to be resolved at trial.

This argument is ill-founded. It was Petitioner himself who alleged in his complaint that he was terminated on account of his active campaign support for his brother's candidacy in the 1986 Sheriff's election (R. 1, paras. 14, 17). Whether termination on account of such activity sufficiently sets out a valid constitutional claim is entirely separate from whether the defendant admits that the claim is factually sound. Notably, Petitioner Thulen does not dispute that he engaged in any of the political activity described by Respondent Bausman. In short, Respondent Bausman's denial of Petitioner Thulen's allegations of a

political firing does not entitle Petitioner to a jury trial if the claim does not set forth a cognizable constitutional violation.

II.

THIS COURT SHOULD NOT GRANT REVIEW ON THE BASIS OF AN INTER-CIRCUIT SPLIT OF AUTHORITY.

Petitioners correctly point out that both the Fourth and Fifth Circuits have held that deputy sheriffs do not occupy positions for which political affiliation is an appropriate requirement. *See Jones*, 727 F.2d at 1338; *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied*, 465 U.S. 925 (1982). Importantly, however, both circuits have also recognized that an impermissible dismissal of a deputy sheriff for mere political affiliation might be constitutionally sound if the deputy became involved in political activity. *Jones*, 727 F.2d at 1338-39. *See also McBee*, 730 F.2d at 1014-17.

Expanding on the distinction between mere political affiliation and active politicking, the Fourth Circuit recently upheld the termination of a deputy sheriff whose vocal support of the Sheriff's opponent caused serious disruption in office morale. *Joyner*, 815 F.2d 20. In so doing, the Fourth Circuit recognized the deputy's "important role in the implementation of the Sheriff's policies" and the heightened need for "mutual confidence and loyalty" in a paramilitary unit. *Id.* at 24. Moreover, the *Joyner* court emphasized that a Sheriff need not wait for actual disruption to occur before acting:

> The combination of Joyner's vigorous campaign and his high position in the department created more than a potential for disruption; they actually created that

> disruption which would have sufficed for his discharge if it had only reasonably been apprehended.

Joyner, 815 F.2d at 24.

In *McBee*, the Fifth Circuit likewise recognized that a deputy's active campaigning puts him on a different plane than a deputy who is terminated for mere political affiliation. While political affiliation claims turn on an analysis under *Elrod/Branti*, the *McBee* court reasoned that claims involving politically active deputies must be assessed against the balancing test set forth by this Honorable Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). *McBee*, 730 F.2d at 1014.

Against that backdrop, it is revealed that neither the Fourth nor Fifth Circuits are in conflict with the Seventh Circuit's decision to uphold the dismissal of deputy sheriffs who actively campaigned for the defeated incumbent and against the new Sheriff. The absence of a conflict under such circumstances is not surprising. The Petitioners' active support of the defeated incumbents in hotly contested Sheriffs' elections is precisely the type of activity which creates a sufficient potential for interference with the new administrations' implementation of programs and policies to warrant replacing those individuals with the new Sheriffs' own supporters. One who lives and thrives by politics must also, unfortunately, often die by politics. *See Thulen*, 930 F.2d at 1218.

The Seventh Circuit's decision permitting Respondents to replace their political opponents with deputies of their own choosing was not unconstitutional under the analysis applied in the Fourth and Fifth Circuits. For that reason, these cases do not present a true inter-circuit conflict and Petitioners' petitions for writs of *certiorari* should be denied.

III.

THE SEVENTH CIRCUIT PROPERLY GRANTED QUALIFIED IMMUNITY IN FAVOR OF RESPONDENTS BASED UPON THE UNSETTLED STATE OF THE LAW AS APPLIED TO DEPUTY SHERIFFS.

The Seventh Circuit held that the unsettled state of the law as to the scope of first amendment protections afforded deputy sheriffs entitled the Respondents to summary judgment on the issue of qualified immunity. 930 F.2d at 1218. This conclusion was premised upon the absence of any controlling authority from this Court or the Seventh Circuit, and on an inter-circuit split on the issue in other jurisdictions. Even the four Seventh Circuit judges who dissented from the denial of rehearing *en banc* on the underlying first amendment issue conceded that "[t]he panel's decision on the qualified immunity issue is correct." *Thulen v. Bausman*, 938 F.2d 84, 86 (7th Cir. 1991). Indeed, Petitioner Thulen has not even asked this Honorable Court to review the qualified immunity issue. Only Petitioner Upton presses forward.

Governmental officials are immune from damages liability so long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Honorable Court more recently refined the test for qualified immunity and emphasized the need for a fact-specific, particularized focus to resolving immunity claims. *Anderson v. Creighton*, 483 U.S. 635 (1987).

In the context of a political termination case, the inquiry for purposes of a qualified immunity analysis should not be restricted merely to whether the law governing politically motivated firings was clearly established in general

terms at the time of the employee's discharge. *See Wrigley*, 842 F.2d at 958. Rather, the public employer should be entitled to qualified immunity if, at the time he acted, the law did not clearly "prevent [him] from discharging someone holding this particular position." *Id.* at 958. Against a backdrop of those principles, the Seventh Circuit's decision in favor of Respondents on the issue of qualified immunity was correct.

Prior to *Thulen*, neither this Court nor the Seventh Circuit had ever addressed whether the prohibition against political firings extended to deputy sheriffs in general, let alone to politically active deputy sheriffs. Furthermore, the presence of uncertainty in the other circuit courts of appeals on the scope of first amendment protections for deputy sheriffs is compelling evidence of the unsettled state of the law. *Compare Terry*, 866 F.2d 373 (deputy sheriffs not protected under *Elrod/Branti*) *and Joyner*, 815 F.2d 20 (politically active deputies may not be protected), *with Jones*, 727 F.2d 1329 (deputy sheriffs are protected under *Elrod/Branti*) *and Barrett*, 649 F.2d 1193 (same).

In light of the unsettled state of the law, there should be no dispute that where reasonable judges differ as to the application of a set of constitutional principles to a specific fact situation, a newly elected county Sheriff untrained in constitutional law should not be held to have violated a clearly established constitutional right.

Despite the conflicting signals from other circuits and the absence of binding authority from either this Court or the Seventh Circuit, Petitioner Upton continues to contest Sheriff Thompson's claim to qualified immunity. In so doing, Upton relies upon this Court's decision in *Elrod*, and

on the Seventh Circuit's decision in *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986). Upton also cites the Fourth Circuit's decision in *Jones*, the Fifth Circuit's decision in *Barrett*, and the fact that Kankakee County had adopted a Sheriff's Merit Commission system which should have alerted Respondent Thompson to the impropriety of utilizing political considerations in employment decisions.

None of the authorities cited by Petitioner Upton indicate that the law with respect to political termination claims brought by deputy sheriffs was clearly established in December of 1986. First, in *Elrod*, this Honorable Court addressed claims advanced by four ministerial workers in a Sheriff's Department of approximately 3,000 employees. *See Elrod*, 427 U.S. at 377 (Powell, J., dissenting). Though Petitioner Upton contends that *Elrod* itself involved a deputy sheriff (Upton's Petition, pp. 27-28), the only deputy involved in that case was a process server, who, as his title reveals, occupied a ministerial role. *Elrod*, 427 U.S. at 350-51.

In addition, Petitioner Upton actively supported the incumbent in the 1986 Sheriff's election. This political campaigning removes his claim from the umbrella of *Elrod*, which involved a large scale patronage machine which targeted all non-civil service employees who failed to pledge allegiance to the democratic party. *Id.* at 351.

Petitioner Upton's active politicking also undercuts his reliance upon the Fourth Circuit's decision in *Jones*, where the court specifically recognized that an impermissible dismissal on account of mere political affiliation might be constitutionally sound if the plaintiffs were involved in political activity. *Jones*, 727 F.2d at 1338-39. *See also Joyner*, 815 F.2d at 24.

Petitioner's reliance upon the Fifth Circuit's decision in *Barrett* is similarly flawed. Though *Barrett* held that Texas deputies may not be fired for mere affiliation, the Fifth Circuit subsequently retreated from that position where politically active deputies are concerned. *See McBee*, 730 F.2d 1009. As indicated previously, the *en banc* Fifth Circuit concluded in *McBee* that politically active deputy sheriffs could be subject to termination under a first amendment free speech balancing test. *Id.* at 1014.

Petitioner's citation to *Perry* is also misplaced. In that case, the Seventh Circuit reviewed a jury verdict in favor of a deputy sheriff who proved he was fired for political reasons. In affirming the verdict, the Seventh Circuit focused solely on causation, rather than examining whether deputy sheriffs are proper plaintiffs in political firing cases. As the lower court reasoned in dismissing Petitioner's reliance upon *Perry*, "[t]he defendant Sheriff [in *Perry*] apparently did not raise and this court appropriately did not address the patronage issue or the immunity question, which would have required an *Elrod-Branti* analysis. . . ." *Thulen*, 930 F.2d at 1216.

Finally, Petitioner Upton's reliance upon the existence of a Merit Commission in Kankakee County which generally prohibited political firings is not persuasive for two equally compelling reasons. First, as the Seventh Circuit noted below, Petitioner Upton was a probationary deputy at the time of his dismissal, and, therefore, not subject to the protections accorded merited deputies under the Sheriff's Merit Commission. *Thulen*, 930 F.2d at 1210. Nonetheless, Petitioner Upton suggests that the mere existence of a Merit Commission system in the County should have alerted Respondent to the impropriety of using political considerations in making employment decisions. To the contrary, it seems more plausible that a reasonable

Sheriff would have viewed a probationary deputy's exemption from Merit Commission protections as an invitation to utilize whatever considerations he deemed appropriate in terminating a probationary deputy. Indeed, there is nothing in the Merit Commission statute which would have alerted a Sheriff to the fact that he could not use political considerations in making employment decisions concerning probationary employees.

Moreover, even if the statute could be read in the manner suggested by Petitioner Upton, such considerations are irrelevant. The inquiry for purposes of a qualified immunity analysis is whether the constitutional principles at issue were clearly established in December of 1986. While Kankakee County's decision to adopt civil service protections might add certainty to the status of certain employment positions, it contributes nothing to the clarity of first amendment jurisprudence in 1986.

For the foregoing reasons, the Seventh Circuit's grant of qualified immunity in favor of Respondents was correct. *Accord Matherne v. Wilson*, 851 F.2d 752, 756-59 (5th Cir. 1988) (law did not clearly prohibit political dismissal of small county deputy in 1983).

IV.

IF CERTIORARI IS GRANTED, THIS HONORABLE COURT SHOULD RETURN THE DISPUTE OVER PATRONAGE EMPLOYMENT PRACTICES TO THE STATES.

In the event this Honorable Court chooses to grant the writs, Respondents request that the Court invite briefing which addresses the continued viability of the federal courts' foray into the arena of political dismissals. As suggested by Justice Scalia in *Rutan*, 110 S.Ct. at 2746-59 (1990) (Scalia, J., dissenting), the past fifteen years since

Elrod have produced inconsistent results and caused confusion for public employees and employers seeking to ascertain with some degree of certainty whether a particular job is protected from patronage considerations. During those years, scores of cases have been litigated over the elusive concept of whether a particular position is one for which political affiliation is an appropriate requirement. No clear approach has emerged from those efforts. *See* Martin, *supra*, p. 4, 39 Am.U.L.Rev. at 23-47 (1989) (cataloging the circuits' treatment of patronage dismissal cases).

Contrasted with the confusion encountered by the courts in applying *Elrod* and *Branti* is the comparative certainty provided by state civil service systems and negotiated contracts. While certainly not a panacea for public employees, such legislation and agreements at least give both public employees and employers an idea of where they stand with respect to job protections. By returning to the states the right to determine which types of jobs are exempt from patronage practices, public employees will know in advance the risks associated with seeking particular jobs. They will no longer be forced to serve in positions without knowing whether they can be fired by a new administration. Public employers will likewise benefit from knowing which jobs may be promised to political supporters, which may be taken from political opponents, and which must be left alone.

Respondents understand that persuasive reasons supported the decisions in *Elrod*, *Branti* and *Rutan*, and that the resolution of these constitutional questions is not as simple as the preceding discussion suggests. Nevertheless, a groundswell of courts and commentators favor returning the issue of patronage practices to the states. *See for example Political Patronage and the First Amendment:*

Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990), 14 Harv.J.Law & Pub. Pol. 292, 302 (1991) (state legislatures are better suited to determine the political requirements of the endless array of jobs in a particular state's government); Bhagwat, *Patronage and the First Amendment: A Structural Approach*, 56 U.Chi. L.Rev. 1369 (1989) (any balancing of competing interests in political patronage context should be left up to the legislature and not the judiciary). Notably, some lower courts in straining to apply *Branti* have paid deference to state civil service legislation. *See for example Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990) (North Carolina statute exempting plaintiffs from civil service status created presumption that discharge or demotion was proper as a matter of law); *Savage v. Gorski*, 850 F.2d 64, 69 (2nd Cir. 1988) (interests of federalism and conservation of judicial resources better served by giving substantial deference to civil service legislation); *Jimenez Fuentes*, 807 F.2d at 246 (although not dispositive, a legislature's classification of civil service personnel is entitled to some deference in an *Elrod/Branti* analysis).

If *certiorari* is granted, Respondents suggest that the Court will benefit from full briefing and argument on the issue of whether the first amendment should continue to be construed so as to generally prohibit political patronage in government employment. The issue was neither briefed nor argued in *Rutan*, and still, four justices expressed their disagreement with the current state of constitutional law in this area. For the foregoing reasons, Respondents respectfully request that, in the event the petitions for writs of *certiorari* are granted, this Court take the opportunity to revisit and reassess the current state of first amendment jurisprudence in the context of patronage practices.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petitions for writs of *certiorari*. In the event, however, that the Court chooses to grant the writs, Respondents request that this Honorable Court take this opportunity to return the question of the propriety of patronage dismissals to the various states.

Respectfully submitted,

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